Public Document No. 12

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING NOVEMBER 30, 1933

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The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 17, 1934.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department for the year ending November 30, 1933.

Very respectfully,

JOSEPH E. WARNER,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,

State House.

Attorney General.

JOSEPH E. WARNER.

Assistants.

ROGER CLAPP.
CHARLES F. LOVEJOY.
EDWARD T. SIMONEAU.
STEPHEN D. BACIGALUPO.
GEORGE B. LOURIE.
LOUIS H. SAWYER.
EDWARD K. NASH.
DAVID A. FOLEY.
SYBIL H. HOLMES.

Chief Clerk.

LOUIS H. FREESE.

Cashier.

HAROLD J. WELCH.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Fiscal Year.

General appropriation for 1933	$101,034 60
Appropriation for small claims	5,000 00
Appropriation under St. 1931, c. 458	4,000 00
	$110,034 60

Expenditures.

For salary of Attorney General		$7,200 00
For salaries of assistants	$40,871 11	
For salaries of all other employees	19,514 80	
For legal services in Dominion of Canada	583 18	
For sheriffs' fees, court stenographers, witness fees and all other special services	16,865 13	
		77,834 22
For law library	$739 18	
For office expenses and travel	3,641 04	
For court expenses	1,222 93	
		5,603 15
For small claims		4,760 31
Total expenditures		$95,397 68

The Commonwealth of Massachusetts

Department of the Attorney General,
Boston, January 17, 1934.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws (Tercentenary Edition), I herewith submit my report.

The cases requiring the attention of this Department during the year ending November 30, 1933, to the number of 8,303, are tabulated below:

Corporate franchise tax cases		2,071
Extradition and interstate rendition		147
Land Court petitions		46
Land-damage cases arising from the taking of land:		
Department of Public Works		415
Department of Mental Diseases		2
Department of Conservation		1
Department of Correction		2
Metropolitan District Commission		114
Metropolitan District Water Supply Commission		43
Miscellaneous cases		618
Petitions for instructions under inheritance tax laws		48
Public charitable trusts		324
Settlement cases for support of persons in State hospitals		14
All other cases not enumerated above, which include suits to require the filing of returns by corporations and individuals and the collection of money due the Commonwealth		4,413
Indictments for murder, capital cases		45
Disposed of	24	
Now pending	21	

THE DEPARTMENT OF THE ATTORNEY GENERAL.

The Department of the Attorney General performs those services which, by common law or by statute, are the duties of the Attorney General as the chief law officer, in all civil and criminal matters affecting the Commonwealth.

The Attorney General: Jurisdiction.

In Criminal Matters.

In criminal matters the function of the Attorney General is prosecution of crime; it is not the detection of crime nor the apprehension of the criminal, which are the functions of the police.

By statute,[1] the Attorney General is required to "take cognizance of all violations of law."

By "violations", necessarily, is meant such alleged violations, composing misdemeanors, but chiefly felonies, as may be evidenced by facts which it is the duty and responsibility of the police first to secure to enable cognizance. By "cognizance" is meant the taking notice of such violations, so evidenced, as are, by statute, within the duties and means of the Attorney General or District Attorneys,[2] or both, to prosecute, effected by the institution and conduct of prosecutions for such violations.

In Civil Matters.

In civil matters, except in matters in which some statute provides that counsel may be employed by some particular commission or board, the Attorney General is the sole officer authorized to represent the Commonwealth.

I. Administration of Laws for Prosecution of Crime.

Mode of its Exercise: By the Office Itself; By Offices of the District Attorneys.

By statute[1] the Attorney General may call upon the District Attorneys to assist him and to act for him in respect to the performance of any duties imposed upon him, except those required to be performed by him personally.[3] As, for the administration of criminal law, the Commonwealth has been divided into districts and provision made therefor, by special creation in each district, of the offices of District Attorney,[4] and as the Attorney General may effect criminal proceedings generally only to such extent as funds may be appropriated and authorized,[1] in practice, through legislative implication, the functions of prosecution, apart from those required to be had by the Attorney General personally or when present, are per-

[1] G. L., c. 12, § 10.

[2] Northern District (Middlesex), Warren L. Bishop, Wayland.
Eastern District (Essex), Hugh A. Cregg, Methuen.
Southern District (Nantucket, Dukes County, Barnstable and Bristol), William C. Crossley, Fall River.
Southeastern District (Norfolk and Plymouth), Edmund R. Dewing, Wellesley.
Middle District (Worcester), Edwin G. Norman, Worcester.
Western District (Hampden and Berkshire), Thomas F. Moriarty, Springfield.
Northwestern District (Hampshire and Franklin), Joseph T. Bartlett, Greenfield.
Suffolk District, William J. Foley, Boston.

[3] G. L., c. 12, § 27.

[4] G. L., c. 12, §§ 12, 13.

formed ordinarily by the District Attorneys and their assistants; and the function of the Attorney General, in the active superintendence and management of all criminal cases ordinarily occurring in any district, is exercisable only in instances where "exigencies of public welfare", as determined by him, require intervention[1] or supersession.

The practice of discretionary trial by the Attorney General of all capital cases[2] was discontinued two decades ago, for many reasons.

With respect to prosecutions by grand jury indictments, the powers of the Attorney General and the District Attorney are alike, except that there may be a special grand jury summoned to hear, consider and report on such matters as the Attorney General may present, upon "a certificate that public necessity requires such action, signed by the chief justice of the superior court."[3]

Conferences of the Attorney General, District Attorneys and Assistants.

The Attorney General and the District Attorneys held four conferences and a special conference of the District Attorneys and their assistants, not only for the consultations prescribed by statute,[2] but for the purpose of action toward prosecution of all reported violations of the banking laws and toward legislation by the General Court, then in session, to enable prosecution of acts not then unlawful and to enable greater unity of action between law enforcement agencies in the suppression of prevalent crime.[4]

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[1] *Commonwealth* v. *Kozlowsky*, 238 Mass. 379.

[2] G. L., c. 12, § 6.

[3] G. L., c. 277, § 2A.

[4] The March conference recommended changes in the banking laws (Senate Bill No. 419): (1) to enable the Commissioner of Banks to make audits as well as examinations of banks; (2) to require the Commissioner to report violations of laws by savings banks and trust companies and any other banks; (3) to prohibit any bank official from receiving any profit, except in certain instances, from transactions involving his duties; (4) to prohibit changes in collateral security held in savings departments of trust companies or the making of loans or investments from such funds unless first approved by the investment committee, or made in compliance with rules first adopted by such committee, with the approval of the Commissioner; (5) to prohibit loans by savings banks upon the stock or bonds of ordinary business corporations in excess of 80 per cent of the value as fixed by the investment committee (now St. 1933, c. 334); (6) to enable prosecution of persons, other than bank officials, causing violations of banking laws.

The June conference recommended a program for crime suppression, copies of which recommendations were sent to the Governor, the President of the Senate and the Speaker of the House of Representatives, as follows:

1. That every District Attorney will immediately aid in the capture and return to other States of all gangsters and racketeers seeking refuge here.

2. That when heinous crime occurs in a district, the District Attorney should be immediately notified by the police.

3. That heinous crime shall be presented at once to a grand jury, if sitting, and will be tried immediately.

4. That police departments use all authority in the pursuit and arrest of a criminal fleeing beyond the bounds of a municipality.

5. That the police department of any city or town shall aid the police of any other city or town on request for such aid by the chief of such department.

6. That measures be effected to enable every police department in the State to be notified immediately whenever a heinous crime has been committed and the perpetrator is at large.

7. That measures be effected for notifying every police department in the State when the department of any one municipality learns of the coming or of the presence of notorious criminals in any part of the Commonwealth.

8. That if the presence of gangsters in any locality becomes known, police departments shall immediately take action; and that investigation be made to consider what measures, if any, may be taken for the enabling of the police to hold persons known to be dangerous characters and known to be criminally disposed so that they cannot be at large and commit heinous crimes.

9. That every police department, where possible, be equipped with radio, so that all departments shall be linked up to enable immediate notice of the escape of a criminal and his apprehension.

ACCOUNT OF ADMINISTRATION OF CRIMINAL LAW BY DISTRICT ATTORNEYS AS TO EACH DISTRICT.[1]

Mr. Bishop (Middlesex) reports that in Middlesex County there are pending 50 felonies and 81 misdemeanors; that the jail is clear except for those defendants who are charged with murder; that an arson ring was broken up after pleas of guilty during the trial and sentences of imprisonment; that a drive against gambling and slot machines has stopped their wide operation in the district; that 7 collection agency rackets have been crushed; that perpetrators of the "Gift Family" scheme, wherein some mysterious benefactor would return 50 per cent on any investment within three months, were sentenced to long-term imprisonment; that a "used car buying racket", advertising the purchase of used cars for cash but paying only a small amount in cash with balance in worthless checks and notes, ended with the imprisonment of its operators; that a racket, whereby persons pretending that for a sum paid by an accused they could "fix" a case with the District Attorney's office, ended with long-term sentences; that a conviction with a year's sentence in the House of Correction and from four to six years in the State Prison was the first severe sentence in the Commonwealth for infractions of law having to do with banks; that there has been co-operation with the Special United States Assistant Attorney General, designated to prosecute cases arising out of the Federal National Bank of Boston, and involving affairs with the Inman Trust Company, to enable Federal prosecution; that a brutal assault upon an attorney, in revenge for acts done by him as a trustee in bankruptcy, was penalized by State Prison sentences of

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10. That discussions be had with the heads of police departments to ascertain to what extent a central clearing house of information and the use of the finger-print system and other means of identification may be utilized and rendered more immediately available to the police departments of the several cities and towns.

11. That chambers of commerce and associations of businesses and trades make known to the Attorney General any hazards of trade through the demands of racketeers for money.

12. That study be made to effect uniformity in the decisions of all courts in the imposition of fines and imprisonment.

13. That study be made to ascertain to what extent persons charged with crime secure advantages, legal and otherwise, as against the rights of the people.

14. That investigation be made to ascertain to what extent there is uniformity in the rules and practices of the various police departments, and to ascertain to what extent any further measures may be required to encourage and to sustain all police service.

15. That the punishment for the crime of kidnapping accompanied by attempt to extort be increased to life imprisonment.

16. That no professional criminal, gangster or racketeer be released on parole.

17. To persist in these efforts until every gangster has been exterminated and future invasion by them is rendered impossible, so that legitimate business and the lives of our people shall not be subjected to the gun of the gangster and the rule of the racketeer.

The September conference pledged support of the proposed Federal measures for crime suppression and co-operation with the United States Department of Justice.

The December conference noted that the apprehension of bandits is the problem of police agencies, and advocated any measures to enable the placement of every facility at the disposal of such agencies; pledged rigorous prosecution of violations of the liquor laws and urged licensing boards to decline to grant licenses before investigation of any criminal records of applicants, and resolved upon recommendations submitted in the report.

After adopting resolutions, the conference adjourned in respect to the memory of Winfield M. Wilbar, late of Brockton, and District Attorney for the Southeastern District.

[1] List of capital cases and disposition is appended.

seven to ten years and fifteen to eighteen years; that in 3[1] murder cases convictions were obtained, but appeals are pending in higher courts.

Mr. Cregg (Essex) reports that all triable cases on the criminal docket were disposed of; that 5 cases of murder, occurring between February 15 and August 15, were disposed of before August 20; that there was an unexpended balance.

Mr. Crossley (Nantucket, Dukes, Barnstable and Bristol) reports that there are no criminal cases pending in the counties of Dukes County and Nantucket; only 40 in Bristol and 10 in Barnstable; that in the County of Dukes County 10 cases were disposed of (5 felonies and 10 misdemeanors); in Nantucket, 20 cases (5 felonies and 15 misdemeanors); in Bristol, 1,480 cases (616 felonies and 864 misdemeanors); and in Barnstable, 150 cases (60 felonies and 90 misdemeanors); that in April, at New Bedford, there were convictions in 3[2] first degree murder cases, all in three weeks; that in Barnstable, on June 24, after two weeks' trial, there was a conviction for a kidnapping, which occurred May 2d, with the maximum sentence of twenty-four to twenty-five years in the State Prison.[3]

Mr. Dewing[4] (Norfolk and Plymouth) reports that in Norfolk there are 34 felonies and 122 misdemeanors pending for trial;[5] that in Plymouth County 26 felonies and 152[6] misdemeanors are pending for trial;[7] that in furtherance of the purpose of prosecuting those who have gone bail more than the statutory five times in a year, indictments have already been obtained;[8] that despatch of justice is exemplified in the recent Brookline holdup, where defendants were indicted for armed robbery, and in twenty-four days were arrested and sent to jail for long terms; that arson cases have been vigorously pressed, with convictions.

Mr. Norman (Worcester) reports that there are 1 felony[9] and 40 misdemeanors pending for trial; that 304 felonies and 486 misdemeanors were disposed of; and that in the one indictment which was for first-degree murder, the defendant was committed for mental incapacity.

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[1] Cases of Annie Wita (convicted of second degree murder of her husband by pouring gasoline over him and setting him on fire; sentenced to life imprisonment; appeal pending in the Supreme Judicial Court).

Snyder and Donnellon (exceptions of defendants, involving question of constitutional right to be present at the view taken by the jury overruled by the Supreme Judicial Court, and the question was argued in the United States Supreme Court by the Attorney General; decision Jan. 8, 1934, sustaining the decision of the Supreme Judicial Court).

[2] The cases of Louis Gwizdowski (appeal to the Supreme Judicial Court; conviction in second degree upheld).

Anthony F. Ladish and Walter Watkins (conviction in second degree; imposition of sentence of life imprisonment).

Arthur B. Manchester (conviction in first degree; commutation of sentence of death to life imprisonment).

[3] May 2, Margaret ("Peggy") McMath kidnapped.

May 6, two defendants apprehended, charged with the crime of kidnapping; May 8, brought before District Court in Provincetown, grand jury specially convened, and defendants indicted; subsequent trial at a special session of the Superior Court; one defendant acquitted, the other convicted.

[4] Mr. Wilbar deceased Sept. 29, 1933, after having served as District Attorney for eleven years. Mr. Dewing qualified Oct. 11, 1933.

[5] This does not include 7 felonies and 57 misdemeanors pending for sentence. There were 122 indictments brought in by the December (1933) grand jury which were disposed of in three weeks' trial, with the exception of about 8.

[6] The number of pending misdemeanors includes 79 cases arising out of the controversies on the cranberry bogs.

[7] This does not include 17 felonies and 37 misdemeanors pending for sentence. It is expected that the February (1934) term at Plymouth will effect a normal condition of the misdemeanor list.

[8] Some defendants went bail anywhere from eight to eighteen times within a year.

[9] The principal witness was in England, and the case, therefore, could not be tried.

Mr. Moriarty (Hampden and Berkshire) reports that armed robberies have been checked in the district; that convictions were obtained in nearly every case of armed robbery and burglary, and in one capital case; that a drive against gambling and slot machines resulted in practical clearance of these operations in the district; that, in one such case, 39 defendants were arrested and pleaded guilty, and machines of a value of $5,000 were confiscated; that there have been convictions in large scale fraudulent lotteries; and that the condition of the criminal docket is such as to permit readiness for trial and disposition of cases as they occur.

Mr. Bartlett (Hampshire and Franklin) reports that in Hampshire there are no felony cases pending and few misdemeanors on appeals from the district courts; that in Franklin there are but one-fifth as many appeals, and that both dockets may be early cleared; that after trials involving violations of automobile laws with death or injuries, for wilful and malicious attempts to burn buildings, for larceny and stealing in certain mortgage investment transactions, there were convictions and sentences; that there were two [1] capital cases, resulting in first-degree verdicts.

Mr. Foley (Suffolk) reports that there are but 500 cases pending in this busy district, as compared with 1,000 a year ago.

Recommendations of the District Attorneys and Attorney General.

1. *That surety companies, acting as bail bondsmen, shall be no longer exempt from the statute requiring registration of professional bondsmen, and providing for revocation of license on failure to satisfy judgments recovered, and for conformity to rules established by the Superior Court.*[2]

This recommendation was made last year. Though surety companies may fail to satisfy judgments, they may not be prohibited from continuing to act as bondsmen.

2. *That when a person qualifies as surety by real estate in bail cases involving felony a lien shall be recorded against the real estate until the case is finally disposed of or until the court otherwise orders.*

This recommendation has been repeatedly made. Prosecution for disposing of or encumbering the real estate during pendency does not compensate the Commonwealth for defeat of the bail.

3. *That surety companies organized under the laws of other States shall retain with the Department of Insurance adequate reserves in this Commonwealth to cover their liability on bail bonds.*

There have been cases where, after forfeiture, bails proved worthless in consequence of insolvency of such foreign companies and of action by the State where organized.[3]

4. *That where real estate is offered on bail bonds, the signature of the consort of the owner thereof be required in order that dower and curtesy rights shall not interfere with the foreclosure of the same.*

5. *That provision be made permitting the county treasurer to bid in property on bail bonds at a sheriff's sale after scire facias proceedings;*

[1] Cases of Edward Stanisiewski, Hampshire County; Harry Clay Bull, Franklin County.

[2] Effected by striking out, in G. L. (Ter. Ed.) c. 276, § 61B, line 28, the words "surety companies or to."

[3] If the change suggested in the note under paragraph 1 is made, this may be made the subject of a rule of the Superior Court.

That provision be made as to the holding and disposing of such property by the county, to the end that forfeited bail may be more easily collected;

That provision be made for service by publication upon absent defendants upon the issuance of scire facias process, so that judgment may be obtained and execution levied against the property even in the event the surety and the principal are not to be found within the jurisdiction;

That, in the event of foreclosure of mortgages on property, entirely extinguishing the equity, and, in instances where it is not possible or feasible to proceed against real estate or other property pledged as bail, or where service may not be obtained, provision be made for the filing of scire facias cases by the court, pending ultimate location of parties involved, or a final disposition of the case, to avoid repetition of issuance of new orders of notice to no purpose;

That professional bondsmen and others be prohibited from procuring other property owners to serve as sureties for customers of such bondsmen and from charging a fee therefor.

6. *That the entire code of criminal procedure be revised so that the rights of the people be equal or paramount to the rights of the individual.*

Conferences[1] of the Attorney General and Every Public Police Agency in the Commonwealth.

In furtherance of the discharge of responsibility of the Attorney General for cognizance of all violations of law, several conferences were had, primarily, to consult to secure common action by such agencies in their respective jurisdictions

[1] On June 28 a conference was called by the Attorney General to which the heads of every public police agency in the Commonwealth were invited, and at which the Commissioner of Public Safety, the Captain of the Metropolitan District Police, the Police Commissioner of the city of Boston, and the chiefs of the police departments of many of the cities and towns in the Commonwealth were present.

This conference was called for the purpose of enabling consultation and deliberation of all law enforcement officers, charged with the responsibility of detecting crime and of apprehending criminals, with the chief law officer, charged with the general responsibility of their prosecution, to the end that activities might be undertaken in concert by such police agencies for the protection of the lives and property of the people by riddance and exclusion of gunmen and racketeers and of general prevalent criminal conditions, and to the end that measures be considered for perfecting unity and celerity of efficient action by the several separate agencies in such detection of crime and apprehension of criminals, whereby prosecutions could ensue.

Certainty of prosecution may be no effective deterrent to crime if there be no certainty of detection of crime and of arrest of criminals and of acquiring of evidence. The Attorney General urged immediate action to the end that, as the sources of income sustaining the racketeer and gangster come not only from robbing of persons and looting of stores and from systematized extortion, but greatly from profits in the operation of gambling slot machines and pools, there might be suppression, by arrest and by confiscation, of such lucrative sources of supply, and that, aside from the fact that such machines and pools were illicit, there might be blotted out a spectacle of social injustice, whereby the lawless were living without working while the law abiding were lacking work for honest living.

The conference pledged common action. It urged study by persons having to do with the prosecution of crime and with crime control procedure, having to do with correction of crime, imprisonment, probation and parole, and having to do with crime prevention affected by social, economic, domestic and general conditions. It urged financial support by the people of the cities and towns for the maintenance of sufficient police personnel and adequate equipment. It appointed a committee for proposal of a means for co-ordinating the various police agencies.

Among other measures of general pertinence, the following suggestions were made as promotive of improved police service and as deterrents to crime:

(*a*) Extension of radio and teletype.

(*b*) Imprisonment for a long term of years for threatening witnesses.

(*c*) That members of the police department be not dismissed except for cause, and in the event employment is temporarily dispensed with, they be retained in good standing.

(*d*) That chiefs of police having had a certain period of service be placed under civil service.

against the menace of crimes of violence and for riddance of any gambling promoters, gangsters and racketeers commorant therein; secondarily, to propose measures which, by legislative sanction, would enable the units of the State Police, of the Metropolitan District Police, and of the police departments of the individual 35 cities and 316 towns to co-operate effectively for the protection of the lives and property of the people from armed banditry through the creation of some single responsible authority, without surrender of the prerogatives of any one unit over its routine affairs; and further, to stress the importance of the maintenance, unimpaired in personnel or in equipment, of all existing departments, modernized by radio and teletype accommodation, to meet the exactions of present-day police protection.

(*e*) That, though G. L. c. 41, § 99, enables use of police of other cities, arrangement be effected to enable more frequent use.

(*f*) That manufacture and possession of machine guns, submachine guns and bombs be prohibited except for and by police officers.

(*g*) That Congress be petitioned to prohibit interstate shipment of machine guns, submachine guns, etc.

(*h*) That there be change in the law relating to misappropriation of automobiles, either increasing the penalty or providing that the taking of an automobile shall be larceny instead of misappropriation.

(*i*) That any person engaged in an illegal occupation or who bears an evil reputation, and with illegal purpose consorts with thieves or criminals or frequents unlawful resorts, shall be guilty of disorderly conduct.

(*j*) That there be public prosecutors to present the government's case in district and municipal courts as in the Superior Court.

(*k*) That there be arrangement by some mode whereby there may be uniformity in sentences for and disposition of similar offences in all courts.

On July 22 the Legislature made provision, upon special message of His Excellency the Governor for the creation of a commission to investigate relative to the prevalence of crime and means for the suppression thereof.

On October 5 the Attorney General appealed to the chiefs of the several cities and towns, and upon their invitation, in consequence of a series of bank and payroll robberies in the Metropolitan district (September 28, South Station mail robbery; October 1, Everett department store; October 2, Brookline Trust; October 3, Somerville payroll; October 4, West Medford payroll and murder), for immediate consultation as to similarity in commission of these crimes; for immediate charting of city and town ways and blocks, having banks or treasure, to enable barricades to prevent escapes; for immediate conference with all business, amusement and banking houses for devising greater protective devices and for co-operation between them and the police.

On October 19, the adjourned conference voted to recommend, as a means for enabling co-ordinative and contemporaneous action by all police agencies in the Commonwealth, the following:

1. That there be a standing Grand Police Council, consisting of the head of every police agency in the State, the chairman to be designated by the Governor, to meet at such times as called together by an advisory commission, for consultation and for discussion on matters relating to crime.

2. That there be an Advisory Commission on Police Affairs of five persons, the chairman to be designated by the Governor, one member to be the Commissioner of Public Safety, four members to be appointed by the Governor, of whom three shall be responsible officers of police departments of any city or town in Massachusetts.

That this commission have power —

(1) To call meetings of the Grand Council of Police for advice and consultation.

(2) To recommend definite measures relating —

(*a*) To adoption of uniform practices and of improved practices in any particular community;

(*b*) To establishment of police schools;

(*c*) To creation and use of a central service for identification of criminals, and dissemination of important information to all police departments to enable immediate concerted action;

(*d*) To installation of devices and methods for detection and apprehension of criminals, and of gunmen and racketeers in particular;

(*e*) To use of any department to aid another or the Commission;

(*f*) To aiding smaller communities in the event such be without an established police force;

(*g*) To ascertaining all the facts in event of occurrence of serious crime and of escape of the criminal undetected.

(*h*) To formulation of methods whereby co-ordinated and co-operative activities may be conducted simultaneously by police departments of the now 316 separate towns and 35 separate cities.

3. To report to the Governor yearly on December first, and at such other times as he may require.

THE STATUS OF THE AGENCIES IN THE COMMONWEALTH PROVIDED FOR LAW ENFORCEMENT THROUGH THE DETECTION OF CRIME AND APPREHENSION OF THE CRIMINAL.

Law enforcement, as effected by and dependent upon detection of its violation, and upon apprehension of violators, is the responsibility neither of the Attorney General nor of the District Attorneys. It is the responsibility of the police.

Law enforcement, as effected by and dependent upon prosecution of violations, triable in the Superior Court, is the responsibility of both the Attorney General and the District Attorneys.

Law enforcement, as effected by and dependent upon detection of crime and apprehension of criminals, is had by the various police agencies, namely, the individual police departments in the several cities and towns with respect to their own areas, the State Police with respect to the Commonwealth generally, and the Metropolitan District Police with respect to the metropolitan area, and by sheriffs, to some extent, in their own counties.

The police departments of the cities and towns are confined to their own areas. They are responsible solely to whatever political administration may be in charge of local governmental affairs. In personnel, equipment, competency and activity they are necessarily representative of the community, creating and maintaining them, in the enforcement of law in such communities upon the attitude of the political administration of local government, and upon the capacity of the local police officials and membership. Neither the Governor, as chief magistrate, endowed with native concern for the welfare of the people, nor the Attorney General, as chief officer supposedly endowed with the concern of crime suppression, nor the District Attorney, charged with concern of prosecution of crime within his district, has any direction or control of the affairs of any police department in any community.

The existence, prevalence or absence of crime in any community is the concern of the police department in, and indirectly of the people of, such community.

As now constituted, the police department of any city or town is no more subject to response to the direction, order or request of a State officer charged with the responsibility of prosecuting crime than is a fire department of such city or town.

It is apparent, therefore, that no agency may cope with crimes of violence and predatory crimes single-handed.[1] It is also evident that, as the several cities and towns maintain at their own expense their own local departments, their direction, control and management may not be more efficiently and justly and wisely accomplished by some single State official or board. But it is also evident that the people of the entire Commonwealth have as much concern in the presence of dangerous criminals in the State as have the inhabitants of any single community where they may perpetrate some single crime, and that officials of the Commonwealth charged with responsibility for preservation of law and order, protection of life and property, and of law enforcement by prosecution should have avail to the uses of departments in cities and towns for concerted action to discharge such responsibility. Without

[1] My predecessor, the Honorable Jay R. Benton, first advanced the unification of the police departments of Metropolitan Boston, extension of radio broadcast, central criminal identification bureau, in 1926 (Pub. Doc. No. 12 (1926), p. 11).

system and responsibility and means it is idle to imagine that there may be expeditious and effective capture of vicious armed criminals.[1]

A Recommendation.

I recommend, therefore, that all heads of all public police agencies comprise a Grand Council of Police whereby conferences may be held for deliberation in police affairs; that an advisory and executive police council be created, serving under the Governor, composed of the Commissioner of Public Safety, the Captain of the Metropolitan District Police, and the heads of three city or town police departments, to be appointed by the Governor, whereby, under direction of the Governor, such Council may effect or prepare plans for the orderly installation or employment of radio and teletype services, for the co-ordinating of the several police agencies for concerted action against roving criminals, and shall report to the Governor, upon his request, for investigation of existence or commission of serious crime anywhere in the Commonwealth, and shall perform such other duties as the Legislature may prescribe.

I recommend that all police be removed from politics, and that tenure, after qualification, be for life, or automatically under civil service, after a period of police service, subject to immediate removal and disqualification from any further public service, upon findings by a justice of a court, upon petition of taxpayers, of corruption or incompetence or infidelity.

As I regard lack of fear of capture as much a factor in the disposition to crime as any lack of fear of conviction, I deem that a primary objective in any program for crime control should be to perfect the law enforcement agencies for the detection of crime and apprehension of criminals as much as law enforcement agencies for prosecution and correction of crime through revised codes for trial, for conviction,

[1] The imperativeness of action is visualized by recitation of heinous crimes, mostly in daylight, many yet without clue, occurring in so short a period as the last four months.

Sept. 4 Holdup in a Scituate restaurant.
14 $100,000 jewelry robbery in Worcester Railroad Station.
16 Somerville paymaster waylaid.
23 Hijacking a truck in Cambridge and seizing $6,500 of goods.
28 South Station mail robbery — $2,600.
Oct. 2 Brookline Trust Company — $20,000 robbery and flight in busiest thoroughfare after disarming policeman respouding to alarm.
3 Somerville Laundry — $600 cash register robbery and holdup of employees.
4 West Medford milk concern — $1,800 payroll seized at pistol point.
5 Somerville company's woman cashier attacked, mistaking first lesser payroll trip for larger second trip.
8 Worcester Theatre — $4,500 robbery, after disarming police guard and forcing manager at gunpoint to open safe.
14 Brookline wholesaler — $4,896 holdup in automobile at street curb.
21 Cambridge company — $1,037 robbery and murder of owner carrying money from bank to company.
Nov. 4 Malden chain store collector — $360 holdup.
5 Roxbury concern — $2,300 safe robbery after holdup of watchman.
10 North Easton First National Bank — $10,000–$20,000 robbery.
13 Attempt to crack safe of Bromfield Street, Boston, concern.
17 $700–$800 payroll holdup at Boston factory of same concern.
21 Revere company's plant superintendent held up in automobile conveying $800 from bank.
Dec. 1 Boston, South End, concern — messenger in automobile robbed of $2,895 payroll.
4 Quincy Trust Company, Wollaston Branch — $20,000 robbery.
13 Turners Falls, Crocker National Bank — $25,000 robbery.
22 Roxbury clothing concern's treasurer robbed of $13,518 payroll.
Jan. 2 Lynn Theatre safe robbery and murder.

for confinement and for punishment, the proposals for which in the laudable report of the Crime Commission, are too voluminous to permit detailed comment.

In the last analysis, the morals of a community will be no greater, no stronger than the character of the individuals composing it. The great pillars of human happiness, "the firmest props of the duties of men and citizens", must ever be, as was said by Washington — religion and morality.

II. Administration of Laws for Civil Business.

Not only by reason of the volume of the civil legal matters of the Commonwealth and all its officers, departments and divisions, which is increasing annually and which exacts the attention of the legal staff, whose number, compensation and facilities conform to legislative will, but by reason of the maintenance of the offices of District Attorneys and their assistants, for prosecutions, and of consequent lessened legislative provision for personal conduct and supervision by the Attorney General of all criminal matters, the services rendered by the department may be characterized as of the nature of those rendered by a Solicitor General rather than as services in criminal matters, such as are assignable to the sole attention of an Attorney General in some other jurisdictions.

LITIGATION.

1. CASES DECIDED DURING THE YEAR.

a. In the Federal Courts.

United States Supreme Court.
United States Circuit Court of Appeals.
United States District Court.

There was one case in the United States Supreme Court.[1] There were two cases in the United States Circuit Court of Appeals,[2] and one case in the United States District Court.[3]

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[1] *Snyder* v. *Commonwealth of Massachusetts.* Appeal of Herman Snyder from decision of the Supreme Judicial Court (Mass. Adv. Sh. (1933) 809; 185 N. E. 376), affirming conviction for first degree murder returned in Superior Court for County of Middlesex, and holding that a defendant has no constitutional right to accompany a jury on a view; that the determination as to whether or not the defendant should so accompany the jury in person rests within the sound discretion of the presiding justice.

[2] *Commonwealth of Massachusetts* v. *Meehan, Trustee in Bankruptcy,* (Nov. 1933), which overruled the United States District Court and *held* that the Commonwealth is entitled to prove against a bankrupt corporation an excise tax measured by the business done for the period preceding the bankruptcy, although the return was not due and the tax was not assessable until a date subsequent to the bankruptcy.

Crawford v. *Hale,* 65 Fed. (2d) 739. Petition for certiorari denied.

[3] *Poresky* v. *Ryan et al.* (54 Sup. Ct. Rep. 3). United States Supreme Court dismissed appeal asking mandamus to the judge of the United States District Court to call to his assistance two other judges to hear application for injunction against the Governor, the Attorney General and the Registrar of Motor Vehicles in enforcement of the motor vehicle compulsory liability insurance (G. L. (Ter. Ed.) c. 90) as deprivation of constitutional right to use of roads, after the judges had, on their motion, dismissed the Governor and the Attorney General as improperly joined parties and dismissed the bill against the Registrar for reasons.

b. In the State Courts.

Supreme Judicial Court.

Six cases invoked decision of the full court. In all, the Commonwealth was sustained. They relate to a variety of topics, principally taxation.[1]

2. Cases Pending November 30, 1933.

a. In the Federal Courts.

United States Supreme Court.

There is one case now pending.[2]

United States Court of Claims.

There is a suit seeking to recover taxes paid upon tobacco bought by the Commonwealth for use in State institutions.[3]

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[1] *Taxation.*

Harvard Trust Company v. *Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1933) 1899. That the statutes of Vermont did not establish a situs so as to exempt a trustee resident in Massachusetts, but appointed in Vermont, from payment of a tax due upon income accumulated for unascertained persons.

Commissioner of Banks v. *Highland Trust Company*, Mass. Adv. Sh. (1933) 965. That taxes due the Commonwealth from a trust company in liquidation are not preferred claims.

Civil Service.

City of Haverhill v. *Commissioners of Civil Service*, Mass. Adv. Sh. (1933) 1341. That the appointment of the Director of Hospitalization was subject to civil service laws.

Other Matters.

Sampson et als. v. *Treasurer and Receiver General* (3 cases), Mass. Adv. Sh. (1933) 361. Dismissing petitions for mandamus against the Treasurer and Receiver-General and certiorari against the Metropolitan District Commission, arising out of assessments by the Treasurer and Receiver-General against the town of Weymouth resulting from its admission into the South Metropolitan Sewerage District.

Christion et als. v. *Secretary of the Commonwealth*, Mass. Adv. Sh. (1933) 969. Dismissing petition for mandamus to require Secretary to issue to the petitioners certain blanks to be used by them in obtaining signatures to a referendum petition on St. 1933, c. 76, entitled "An Act abolishing the division of smoke inspection in the Department of Public Utilities and relative to the abatement of smoke in the city of Boston and vicinity."

Harding v. *Commonwealth*, Mass. Adv. Sh. (1933) 1259. Dismissing appeal from affirmation by a single justice, on a petition for a writ of error, of the judgment of the Superior Court in general imposition, collectively, of not more than eight nor less than five years in State Prison, on a conviction, on two out of three counts for larceny, and on three further counts for receiving stolen goods, where, in view of the fact that the record disclosed no restitution and disclosed previous convictions for similar crimes, it was wrongly contended that G. L. (Ter. Ed.) c. 266, § 60, permitted a five-year maximum only, and that § 61 exempted from State prison on a first conviction with restitution.

Single Justice.

Hartshorn v. *Board of Optometry.* Decision to the effect that misrepresentations in advertising by registered optometrists constitute fraud and deceit in practice and may be the basis for suspension or revocation of license.

Attorney General v. *Selectmen of Williamstown* (to effect payment of soldiers' relief to a veteran). After auditor's hearings and hearings before two justices of the Supreme Judicial Court, power to enable the Attorney General to secure payment of soldiers' relief was effected by passage of St. 1933, c. 323, amending G. L. c. 115, § 18.

Defence of judiciary on *writs of error* (8).

Successful defence of institutions on petitions for release on *habeas corpus* (16).

Superior Court.

Among many dispositions, by special authorization of St. 1933, c. 331, was the case of *Treasurer and Receiver General* v. *County of Middlesex*, upon payment of $30,000 (40 per cent of claims) after approval of certain officials, in three suits for recovery of support of Middlesex County patients at Rutland State Sanatorium.

[2] *Downey and Gallegher* v. *Hale*, 67 Fed. (2d) 208. Petition for certiorari pending.

[3] *Commonwealth of Massachusetts* v. *United States.* Whether United States has right to impose excises in connection with the manufacture of articles purchased by a State or subdivision thereof.

b. In the State Courts.

Supreme Judicial Court.

A few cases relating to different matters await decision.[1]

c. In the Superior, Probate, Municipal and District Courts.

The cases were of the usual type.[2]

III. Statutory Services.

Of the great number of varying services, required by many statutes, which comprise the routine of the department, a few only are here noted.

1. *Small Claims.*

Under the act[3] enabling settlement by the Attorney General of certain claims upon finding of damages under $1,000, 81 claims were filed, and 42 were approved, with a total award of $4,760.31. Of the 42, 29 came from accidents with State-owned vehicles; 5 from defects in State-owned property; and 8 from miscellaneous causes. The appropriation for the purpose is but $5,000.

A somewhat similar question arises in connection with the processing tax now imposed by the United States. The burden of this tax is reflected in the price of the goods, and the Commonwealth, so far as it purchases articles subject to the tax, in fact bears the burden. Protest to imposition of this tax, upon goods which the Commonwealth must purchase for its institutions, has been asserted by this department.

[1] *Taxation.*

Tirrell v. *Tax Commissioner.* Whether certain income is taxable as an annuity or as income from a trust.

Sayles v. *Tax Commissioner.* Whether a refund under a covenant in a corporate bond to reimburse the holder for income taxes paid is taxable as "interest" under the Massachusetts income tax statute.

Newton Building Company v. *Tax Commissioner.* Whether a leasehold interest held by a domestic corporation in foreign real estate is deductible as "real estate" in determining the corporate excess under the Massachusetts corporation excise tax statute.

Brady v. *Tax Commissioner.* Whether petitioner is entitled to a refund of taxes paid on gasoline alleged to have been used otherwise than upon the highways of the Commonwealth.

The Billboard Cases.

These are 15 cases by bills in equity, brought in the Supreme Judicial Court by 23 persons and corporations engaged in the outdoor advertising industry, 13 cases are known as "The Commonwealth Case" (*General Outdoor Advertising Co. Inc. et als.* v. *Department of Public Works, Division of Highways*), "The Concord Case" (*General Outdoor Advertising Co. Inc. et als.* v. *Samuel Hoar et als.*) and "The Chevrolet Sign Case" (*Charles I. Brink* v. *Department of Public Works, Division of Highways*); they were referred to a master, who filed original and supplemental reports, to which the complainants filed voluminous objections and moved to recommit; May 22, 1933, single justice of the Supreme Judicial Court, by interlocutory decree, denied motion; May 24, Commonwealth moved confirmation of master's reports and for entry of final decrees; May 25, complainants appealed to the full court from decree denying their motion; June 23, without decision upon Commonwealth's motion or complainants' appeal, cases were reserved by another justice for full court; very extensive briefs had to be prepared; cases were argued before the full court by special assignment for three days (November 20 to 22, inclusive), and await decision.

Other Matters.

Taunton Grade Crossing Abolition Case. A petition of an acceptance corporation to intervene as a party was denied in the Superior Court and the case, reported to the full court, awaits early argument.

[2] These comprise litigations in the Superior Court; 58 petitions in equity for enforcement of claims of liens against State contracts; proceedings in special commissions; alterations of bridges in Pittsfield, Bernardston, Uxbridge, Hinsdale, Rowley, Oxford, Wellesley and Chelmsford; defence of the Commonwealth in land damage suits (increasingly large number filed by reason of large number of building projects recently undertaken; entry at rate of 20 to 30 in some months to 50 in others; total of approximately 577 suits pending; 103 cases settled and 34 cases tried and disposed of; trial may average two or three weeks and so attention to these cases is constant); defence of Commissioner of Banks.

[3] St. 1924, c. 395.

2. *Defence of State Employees in Certain Suits against Them.*

Under the statute[1] providing for defence of State employees when sued for personal injuries arising out of accidents while driving State-owned cars in the course of their duty and for payment of judgments up to $5,000, there have been numerous actions.

3. *Public Charitable Trusts.*[2]

Although there have been the customary occasions for recourse to *cy-près*, no case of singular importance has arisen and the amounts involved have not been large.

4. *Public Administrators.*

Public administrators[3] paid into the treasury of the Commonwealth the sum of $32,821.92 as escheats in estates to which heirs or next of kin could not be found. There are now 54 active public administrators, and they have held relatively very few of these estates for more than a year, and then for valid reasons.

5. *Services Required by the Legislature.*[4]

These comprise membership on various commissions and required considerable attention.

6. *Industrial Accident Cases; Approval of Contracts, Deeds and Titles.*

Appearance in claims (under G. L. c. 30, § 39, as amended) for workmen's compensation by employees of the Commonwealth.[5]

Requirements for examination of leases[6] and contracts[7] have increased, and of deeds notably.[8]

7. *Applications for Renditions; Petitions for Writs of Error.*

There were 147 requests; 40 by other States (2 refused); 64 by Massachusetts, of which 43 were for persons charged with non-support and desertion (2 refused).

There were 8[9] petitions for writs of error, all of which were successfully defended.

There were several habeas corpus cases; two reached the United States Supreme Court.[10]

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[1] G. L. c. 12, § 3, amended by St. 1931, c. 458, § 1, effective Sept. 10, 1931.

[2] G. L. c. 12, § 8.

[3] 49 public administrators report estates in process of settlement; 3 report no estates outstanding; actual cash on hand of $280,974.47 in 208 separate estates.

[4] To pass upon municipal emergencies and approve loans (G. L. (Ter. Ed.) c. 44, § 8 (9)).

To pass upon and approve renewal of certain temporary revenue loans by cities and towns (St. 1932, c. 303; St. 1933, c. 3).

To pass upon emergency appropriations by the city of Boston (St. 1933, c. 159).

To investigate as to State assistance to veterans in acquiring farms and homes (Res. 1933, c. 7).

To investigate the advisability of licensing contractors and builders and relative to certain matters relating to contracts for and the employment of persons on public works (Res. 1933, c. 33).

To investigate certain questions relative to granite and foundry industries and the problem of industrial disease generally (Res. 1933, c. 43).

Member of Advisory Commission for Mashpee (St. 1932, c. 223).

Member of Milk Regulation Board (St. 1932, c. 305).

Member of board of appeal on milk and cream dealers' licenses (St. 1933, c. 338).

Delegate to convention for nomination of persons for election as delegates to act upon the Eighteenth Amendment to the United States Constitution (St. 1933, c. 132).

[5] 22 closed, 33 pending.

[6] Examined as to form 29 leases.

[7] 375 contracts — 194 related to food supplied to various State institutions.

[8] 1,060 deeds have been examined, 828 for the Department of Public Works for highway purposes, 38 for the Department of Conservation for forestry purposes.

[9] One of these went to the full court (*Commonwealth* v. *Harding*, Mass. Adv. Sh. (1933) 1259).

[10] *Crawford* v. *Hale*, writ of certiorari denied; and *Downey and Gallegher* v. *Hale*, still pending.

IV. Observations.

In the range of such civil and criminal matters as are by statute under the attention of the Attorney General, inequities have been observed which, through operation of law or of social system, I deem inimical to the people in the enjoyment of equality in their right to live, to earn, to possess and to pursue happiness, sufficiently and securely, under liberty and social justice, some of which are mentioned for consideration of and alleviation by the General Court.

1. To establish the equity of the people against certain privileges of gamblers and illicit traffickers.

a. That money seized in gambling raids and lotteries be forfeited to the State. [1]

There appears to be no legal authority [2] for disposition of money seized by police in gambling raids, except its return to a claimant, for the reason that the statute [3] relating to forfeiture proceedings authorizes destruction of articles in the event there is no claimant, and that, as money cannot be lawfully destroyed, there is no alternative except return to the claimant, though he may be adjudged guilty of gaming. It is an anomaly that a gaming house proprietor, though there be destruction of his gambling implements, should smugly retain his booty. The people should not be powerless to make a gambler forfeit his illicit gains.

b. That the penalty for violation of gaming laws be increased.

A fine of fifty dollars cannot be expected to deter gambling enterprises, wheeling thousands of dollars.[4]

c. That the provisions of law, designating the officials authorized to issue search warrants in various cases, be made uniform, [5] *so that there may be clarity as to the power of justices of the peace with authority to issue criminal warrants and to issue search warrants for gambling raids.*

The wording of the laws authorizing the issuance of search warrants for articles used in forbidden acts is as variant as is the number of statutes relating to such acts — for example, liquor, gambling, equipment, fighting birds, fish and game and narcotics. Lack of uniformity occasions doubt as to what officials have authority to issue warrants. Recently it was disputed that a justice of the peace, authorized to issue criminal process, had authority to issue warrants for gambling and liquor. St. 1933, c. 376 (§ 42 of new G. L. c. 138), specifically provided power for liquor raids.

2. To establish the equity of the people against certain privileges of dealers in securities.

a. That banks and bank officials be prohibited from engaging in the business of selling securities.

Last year I recommended that the business of banking and the business of selling securities or otherwise dealing in securities be completely divorced one from the other.

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[1] This may be effected by amendment of G. L. (Ter. Ed.) c. 276, §§ 1, 7.

[2] *Attorney General* v. *Justices of the Municipal Court of the City of Boston*, 104 Mass. 456.

[3] G. L. (Ter. Ed.) c. 276, §§ 1, 7; money seized in raids is held by the officer for evidence, and after determination of the case, for which it is used as evidence, it must be returned to the claimant or disposed of, under the provisions for unclaimed evidence, which, so far as they apply to the State Police, are contained in G. L. (Ter. Ed.) c. 147, § 6A to § 6D, and so far as they apply to local police, in G. L. (Ter. Ed.) c. 135, § 7 to § 11.

[4] Some $7,600 seized in the Casa Madrid raid. There must be provision for forfeit of such sums to the treasury of the people. This may be accomplished by amending G. L. (Ter. Ed.) c. 271, § 23, and G. L. c. 276, § 1, cl. 11, and § 5.

[5] This may be accomplished by changing G. L. c. 276, § 1, and G. L. c. 271, § 23.

This has been accomplished in relation to national banks by the Banking Act of 1933. I recommend that similar provisions be passed relating to banks under the jurisdiction of this Commonwealth.

b. That tipster sheets and other publications advising relative to the investment in or purchase of securities be brought under the jurisdiction of the Director of Securities.

I have in past years advocated that tipster sheets be regulated. Many fraudulent stock promotions are conducted through financial services and publications or by telephone or telegraph campaigns inaugurated from this State. At the present time only a registered broker or salesman may sell securities. This provision should be extended to every one who is engaged in the business of advising relative to investment in or purchase of securities, and I so recommend.

3. To establish equity of the people against certain privileges of collection agencies.

a. That collection agencies be regulated and licensed.

Many collection agencies have resorted to unscrupulous and improper practices in the conduct of their business. For the protection of agencies, which conduct their business in a legal and proper manner, as well as for the protection of debtors and those who entrust the collection of moneys to collection agencies, I again recommend that every person engaged in the business of collecting moneys for others be required to be licensed.

b. That the use of documents designed to imitate court process be prohibited.

Debtors and persons not subject to any liabilities have been put in fear through use of documents, demanding payment or satisfactions, which are designed to create the impression that such documents are issued pursuant to the authority of some court or other tribunal of this Commonwealth, whereas, in fact, they carry no such authority. This practice should be prohibited, and I again so recommend.

4. To establish the equity of the people in their earnings against certain privileges of their attachers.

a. That the laws relating to attachment of wages be reformed to enable retention by workers of sufficient wages to maintain existence.

Under the present law, wages for personal services are exempt in the amount of twenty dollars, or in the amount of ten dollars if the claim against the wage earner is one for necessaries.

I recommend that this exemption be raised to twenty dollars, out of the wages for each calendar week.

I also recommend that in every trustee writ, the employer be directed to pay over to the employee such exempted amount when due.

I also recommend a penalty against persons issuing writs for the attachment of wages in cases where debtors have no wages not exempt from attachment in the hands of the trustee. In too many cases attachments of wages are made when the creditor well knows that there are no wages in the hands of the employer not exempt from attachment, and purposes purely to harass the employee by placing him in danger of discharge by his employer because of the annoyance.

5. To enable cities and towns to designate qualification of persons for plumbing permits.

That cities and towns be authorized to pass ordinances or by-laws limiting the issuance of plumbing licenses to master plumbers.

G. L. (Ter. Ed.) c. 142, § 13, does not appear to enable cities and towns to pass ordinances and by-laws providing that plumbing permits be issued to master plumbers only.

I recommend such legislation so to permit and to validate any and all ordinances and by-laws previously passed to this effect.

6. To enable prosecution of forgeries upon nomination papers.

That the persons procuring signatures upon nomination papers be required to certify under oath that the signatures procured are genuine to the best of their knowledge and belief.

Similarity in handwriting on nomination papers has created suspicion that the signatures thereon have not been authentic, and investigation and prosecution have been disenabled, through lack of means of identification of persons circularizing or filing such papers.

I recommend that some measure of responsibility for the genuineness of signatures on nomination papers be placed upon the persons procuring such signatures, by requiring signature to each paper and declaration under oath that the signatures are genuine to the best of his knowledge and belief.

7. To establish the equity of the people against risks of loss of savings in banks.

That a State system of deposit insurance be instituted by the Mutual Savings Central Fund, Inc., for the protection of depositors in savings banks of the Commonwealth.

In August [1] I proposed a system of savings deposit insurance for the mutual savings banks of Massachusetts, and separation of such banks from membership in the Federal Reserve System and from participation in the Federal Deposit Insurance Fund, and I also sponsored this proposal before the Special Commission on Banking. I now so recommend. My reasons, among others, in support thereof are as follows:

1. The savings banks of Massachusetts have had a remarkable record. The combined losses of all savings banks, closed between 1843 and 1931, have been less than two and a half millions of dollars. During the recent banking debacle only two of our mutual savings banks fell into the possession of the Commissioner of Banks. Both have reorganized and reopened and the losses to depositors minimized. The deposits of this proven sound savings bank system should not be subjected to the burden of guaranteeing deposits of banks throughout the length and breadth of the country, which the crisis proved fundamentally less sound.

2. The savings banks of Massachusetts are mutual institutions. No profits are taken from them by stockholders. All profits are utilized for the payment of interest to depositors or for the establishment of reserves for possible future losses. This mutual system should not be associated, through a joint deposit insurance fund, with commercial banks primarily operated for the profit of stockholders.

3. The Federal Deposit Insurance Fund will ultimately insure deposits of large amounts. The amount which any one person may have on deposit in any one mutual savings bank is limited. No savings bank should be part of any deposit insurance system to help insure deposits in another bank of an amount greater than the savings bank itself is authorized to accept.

4. Membership in the Federal Deposit Insurance System necessitates membership in the Federal Reserve System. I think that the mutual savings banks of Massachusetts do not need the facilities offered to members of the Federal Reserve System; that expenditures for such membership are needless, and are, consequently, an unnecessary burden on the depositors.

[1] Before the National Convention of the Attorneys General at Grand Rapids, Aug. 29, 1933.

5. The Mutual Savings Central Fund, Inc., may be adequately equipped to effect such a State-wide deposit convenience system for the mutual savings banks of Massachusetts, which would incidentally enable them more easily to compete with banks which advertise insurance to depositors through the Federal Deposit Insurance System.

8. To enable institution by the Attorney General of investigations for prosecutions of violations of criminal laws and institution of proceedings for violation of laws against combinations, agreements and unlawful practices in restraint of trade, or for the suppressing of competition or the undue enhancement of the price of articles or commodities in common use.

The power of the Attorney General is specifically limited in its exercise to the extent of sums appropriated by the General Court. In all investigations of violations of criminal laws, the Attorney General is confined, by reason of limited funds, to such exercise as the excellent detective division of the Department of Public Safety may be at liberty to render, but the Attorney General should be enabled, in matters requiring immediate action or extended inquiry, or employment of persons having specialized knowledge, to proceed expeditiously. That the public interest may be effectively safeguarded against such criminal operations and unlawful practices, I recommend and urge adequate financial provisions for securing of data and evidence to support the cause of the people; power without means is empty.

9. To enable relief of home owners with mortgages subject to foreclosure.

It must be realized that co-operative banks are carrying $32,000,000 and the savings banks $81,000,000 in their foreclosure accounts. All the former, of course, affects homes; of the latter, about 70 per cent. I deem that the maintenance of the home-owning or home-acquiring class — victims of economic vicissitudes — is more calculated to the security of the State than the immediate enforcement of mercenary-motivated agreements, and I believe, from the tragic index recited, that stays are warranted.

10. To enable preservation of husbandry, farming and dairying native to Massachusetts.

As the farming industry is second largest in the Commonwealth, its size, number of persons engaged, investment, and the fact that it is naturally indigenous to the State argue defence against invasion and distribution of products disrupting and destroying it. The home market, so readily accessible, would also become vassal to distant herds and herders immune from our inspection. By nature, tillage of the soil and husbandry for the sustenance of mankind have prime claim to protection and encouragement by all legislative bodies.

11. To enable the subsistence and care of workers incapacitated from gaining livelihood through diseases contracted in occupations contributive to the common wealth of society.

A system cannot survive, which throws into wastage the toiler, diseased in work contributive, through actual creation of goods, to the common wealth of society and prosperity of the State. Incapacity, incurred in industry in the production of commodities necessary for the existence, comfort and commerce of the State, justly may claim beneficent measures from society, immune from risks in health-jeopardizing processes for the creation of society's common wealth.

In this era of aspiration for social justice, the charter of all our liberties — the Constitution of the United States — is marvellously according, through its in-

herent power of adaptation, the enablement of its attainment. America shall evolve the ideal of Liberty and Justice for all.

> "A land of settled government,
> A land of just and old renown
> Where Freedom slowly broadens down
> From precedent to precedent."

Conclusion.

A Recommendation.

I repeat my recommendation that the provisions of G. L. (Ter. Ed.) c. 31, be extended to Louis H. Freese, chief clerk for forty-three years, and to Harold J. Welch, cashier for thirty years, so that there may be continuance to the Commonwealth of their conspicuous and rare service.

An Appreciation.

To the Assistant Attorneys General, to all others associated in the Department, to the District Attorneys and their assistants, to the members of the police, State and municipal, I express gratitude for the measure of service this department has endeavored to render the people.

Respectfully submitted,

JOSEPH E. WARNER,
Attorney General.

Details of Capital Cases.

1. Disposition of indictments pending Nov. 30, 1932:

Northern District (Middlesex County cases: in charge of District Attorney Warren L. Bishop).

Chin Kee.

Indicted September, 1932, for the murder of Sam Lee, at Melrose, on Aug. 24, 1932; arraigned Sept. 14, 1932, and pleaded not guilty; trial October, 1932; verdict of guilty of murder in the first degree; thereupon sentenced to death by electrocution; Sept. 7, 1933, commutation of sentence to life imprisonment.

Northwestern District (in charge of District Attorney Joseph T. Bartlett).

Florence M. Williamson.

Indicted in Hampshire County, October, 1932, for the murder of William L. Williamson, at Northampton, on Oct. 23, 1932; arraigned Oct. 25, 1932, and pleaded not guilty; March 6, 1933, entry of *nolle prosequi* as to so much of said indictment as charged murder in the first or second degree; trial March, 1933; verdict of not guilty.

Southern District (in charge of District Attorney William C. Crossley).

Louis C. Blanchette, John H. West and Clifford R. Wordell.

Indicted in Bristol County, February, 1932, for the murder of Elizabeth T. Head; arraigned Feb. 8, 1932, and each pleaded not guilty; trial March, 1932, as to West and Wordell; verdict of guilty of murder in the second degree as to both; thereupon sentenced to State Prison for life; July 7, 1933, entry of *nolle prosequi* as to Blanchette.

Roland G. Bousquet.

Indicted in Bristol County, February, 1932, for the murder of Edward E. Gobin, at Attleboro, on Jan. 20, 1932; arraigned Feb. 8, 1932, and pleaded not guilty; trial March, 1932; verdict of guilty of murder in the first degree; thereupon sentenced to death by electrocution; April 29, 1933, commutation of sentence to imprisonment for life.

Arthur B. Manchester.

Indicted in Bristol County, November, 1932, for the murder of Arthur Pelletier and Marilla Pelletier; arraigned Dec. 1, 1932, and pleaded not guilty; trial April, 1933; verdict of guilty of murder in the first degree; thereupon sentenced to death by electrocution; Oct. 6, 1933, commutation of sentence to imprisonment for life.

Western District (in charge of District Attorney Thomas F. Moriarty).

Mary Walence.

Indicted in Hampden County, September, 1932, for the murder of Paul Walence, at Holyoke, on July 11, 1932; arraigned Oct. 6, 1932, and pleaded not guilty; trial March, 1933; verdict of guilty of manslaughter; thereupon sentenced to jail for eighteen months.

2. Indictments found and dispositions since Nov. 30, 1932:

Eastern District (Essex County case: in charge of District Attorney Hugh A. Cregg).

Tony Buffa, *alias*, Edward Cullen and Joseph Scrow, *alias*.

Indicted March, 1933, for the murder of Francis V. Quinn, at Lynn, on Feb. 15, 1933; arraigned March 20, 1933, and each pleaded not guilty; trial July, 1933; verdict of guilty of murder in the second degree as to each; thereupon sentenced to State Prison for life.

Jessie Burnett Costello.

Indicted March, 1933, for the murder of William J. Costello, at Peabody, on Feb. 17, 1933; arraigned March 20, 1933, and pleaded not guilty; trial July and August, 1933; verdict of not guilty.

William A. Hooper.

Indicted March, 1933, for the murder of William Lewey, at Nahant, on Jan. 30, 1933; arraigned March 20, 1933, and pleaded not guilty; March 24, 1933, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not less than six years nor more than seven years.

Northern District (Middlesex County cases: in charge of District Attorney Warren L. Bishop).

Bernard Evans.

Indicted November, 1933, for the murder of William Manning, at Wilmington, on Oct. 27, 1933; Nov. 9, 1933, entry of *nolle prosequi* as to so much of said indictment as charged murder in the first or second degree; arraigned Nov. 16, 1933, and entry of a plea of not guilty to manslaughter was ordered by the court; indictment placed on file.

Michael Fontana.

Indicted January, 1933, for the murder of Salvatore Mamolo, at Cambridge, on Dec. 23, 1932; arraigned Jan. 6, 1933, and pleaded not guilty; March 13, 1933, retracted former plea and pleaded guilty to manslaughter, which was accepted; thereupon sentenced to State Prison for not less than seven years nor more than ten years.

Robert B. Jonah.

Indicted January, 1933, for the murder of Charles A. Jonah and Amanda E. Jonah, at Newton, on Dec. 15, 1932; arraigned Jan. 19, 1933, and pleaded not guilty; Feb. 16, 1933, retracted former plea and pleaded guilty to murder in the second degree, which was accepted; thereupon sentenced to State Prison for life.

Fortunato Scire.

Indicted July, 1933, for the murder of Charles Bevalacqua, at Woburn, on July 21, 1933; arraigned Aug. 4, 1933, and pleaded not guilty; Nov. 20, 1933, entry of *nolle prosequi* as to so much of said indictment as charged murder in the first degree.

Southeastern District (in charge of District Attorney Winfield M. Wilbar).

Joseph Calvi.

Indicted in Plymouth County, June, 1933, for the murder of Joseph Silipo, at Hingham, on May 13, 1933; arraigned June 23, 1933, and pleaded not guilty; June 20, 1933, entry of *nolle prosequi* as to so much of said indictment as charged more than murder in the second degree.

Southern District (in charge of District Attorney William C. Crossley).

Walter Waitkins and Anthony Ladish.

Indicted in Bristol County, February, 1933, for the murder of Charles Hibbert; arraigned Feb. 21, 1933, and each pleaded not guilty; trial April, 1933; verdict of guilty of murder in the second degree as to each; thereupon sentenced to State Prison for life.

Suffolk District (Suffolk County cases: in charge of District Attorney William J. Foley).

John T. O'Donnell, *alias*, Frank Karlonas, *alias*, James A. Scully, *alias*, and John J. Burke, *alias*.

Indicted April, 1933, for the murder of Charles Solomon, on Jan. 24, 1933; O'Donnell, Karlonas and Burke arraigned May 9, 1933, and Scully on Oct. 25, 1933, and each

pleaded not guilty; trial June, 1933, as to O'Donnell, Karlonas and Burke; verdict of not guilty; trial December, 1933, as to Scully; verdict of not guilty.

3. Pending indictments and status:

Eastern District (in charge of District Attorney Hugh A. Cregg).

Clifton W. Cunningham.

Indicted September, 1933, for the murder of Shirley Anne Cunningham, at Beverly, on Aug. 26, 1933; committed to the Bridgewater State Hospital for observation Sept. 18, 1933.

Middle District (in charge of District Attorney Edwin G. Norman).

Achilea Legor, *alias*.

Indicted December, 1932, for the murder of Arthimisi Legor, at Worcester, on Dec. 2, 1932; arraigned Dec. 21, 1932, and pleaded not guilty; Feb. 15, 1933, adjudged insane and committed to the Bridgewater State Hospital.

Northern District (Middlesex County cases: in charge of District Attorney Warren L. Bishop).

James Deshler and Marshall J. Bowles.

Indicted November, 1933, for the murder of Adolph Sommers, at Cambridge, on Oct. 20, 1933; Deshler arraigned Nov. 10, 1933, and Bowles on Nov. 13, 1933, and each pleaded not guilty.

Nellie Dyczheski.

Indicted June, 1933, for the murder of Eugene, Chester and Irene Dyczheski, at Framingham, on May 25, 1933; July 17, 1933, committed to Westborough State Hospital.

James T. Garrick, Herman Snyder and John A. Donnellon.

Indicted April, 1932, for the murder of James M. Kiley, at Somerville, on April 9, 1931; Garrick and Snyder arraigned April 6, 1932, and Donnellon on May 2, 1932; Snyder and Donnellon each pleaded not guilty, and entry of a plea of not guilty was ordered by the court as to Garrick; trial May, 1932, as to Snyder and Donnellon; verdict of guilty of murder in the first degree as to each; appeal dismissed by Supreme Judicial Court of Massachusetts [Mass. Adv. Sh. (1933) 809]; petition for certiorari pending before Supreme Court of the United States; indictment as to Garrick pending.

Annie Wita.

Indicted September, 1933, for the murder of Anthony Wita, at Cambridge, on Sept. 10, 1933; arraigned Sept. 15, 1933, and pleaded not guilty; trial October, 1933; verdict guilty of murder in the second degree; thereupon sentenced to the Reformatory for Women for life; exceptions, claim of appeal and assignment of errors pending.

Northwestern District (in charge of District Attorney Joseph T. Bartlett).

Harry Clay Bull.

Indicted in Franklin County, August, 1933, for the murder of Albert C. Jordan, at Greenfield, on Aug. 7, 1933; arraigned Aug. 21, 1933, and pleaded not guilty; trial October, 1933; verdict of guilty of murder in the first degree; thereupon sentenced to death by electrocution within the week beginning Feb. 4, 1934.

Ruth E. Compton.

Indicted in Franklin County, August, 1933, for the murder of Mabel A. Grogan, at Warwick, on July 27, 1933; committed to a hospital for the insane for observation.

Edward T. Stanisiewski.

Indicted in Hampshire County, October, 1933, for the murder of Timothy L. Diggins, at Amherst, on Oct. 11, 1933; arraigned Oct. 17, 1933, and pleaded not guilty.

Southeastern District (in charge of District Attorney Edmund R. Dewing).

John Bowen and John Daley.

Indicted in Norfolk County, April, 1933, for the murder of Harry Riddell, at Quincy, on Nov. 1, 1932; arraigned April 26, 1933, and each pleaded not guilty; Bowen later retracted former plea and pleaded guilty to murder in the second degree; thereupon sentenced to State Prison for life; May, 1933, trial of Daley; disagreement of the jury.

Louise E. Holst.

Indicted in Norfolk County, September, 1933, for the murder of Albert S. Holst, at Medway, on April 25, 1933; Nov. 28, 1933, committed to the Foxborough State Hospital for observation.

James H. Kelley.

Indicted in Norfolk County, December, 1932, for the murder of Francis W. Finch, at Randolph, on Sept. 15, 1932; Dec. 14, 1932, committed to Bridgewater State Hospital for observation.

Ahmed Osman and Alley Osman, *alias*.

Indicted in Norfolk County, April, 1933, for the murder of Nellie Keras, at Norwood, on Dec. 25, 1932; arraigned April 24, 1933, and each pleaded not guilty; trial May, 1933; verdict of not guilty as to Alley Osman, and verdict of guilty of murder in the first degree as to Ahmed Osman; motion for new trial denied June 1, 1933; June 23, 1933, assignment of errors filed; Nov. 29, 1933, rescript "Judgment on the verdict."

Southern District (in charge of District Attorney William C. Crossley).

Frank Dombzalski and Louis Gwizdoski.

Indicted in Bristol County, November, 1932, for the murder of John Roselowitz; arraigned Dec. 1, 1932, and each pleaded not guilty; trial April, 1933, as to Gwizdoski; verdict of guilty of murder in the second degree; motion for new trial and assignment of errors pending; July 7, 1933, entry of *nolle prosequi* as to Dombzalski.

Suffolk District (in charge of District Attorney William J. Foley).

Nicholas Porazzo, *alias*.

Indicted April, 1933, for the murder of Michael Richardi, on Jan. 1, 1933; arraigned May 4, 1933, and pleaded not guilty.

OPINIONS.

Teachers — Tenure — City of Pittsfield.

St. 1932, c. 280, renders ineffective the provisions of G. L. c. 71, § 41, and part of those in section 42 with relation to the public school-teachers of Pittsfield.

Dec. 2, 1932.

Dr. Payson Smith, *Commissioner of Education.*

Dear Sir: — You have asked my opinion as to the effect produced upon the tenure of office of teachers duly appointed in the public schools of the city of Pittsfield by the terms of St. 1932, c. 280.

Prior to the enactment of said St. 1932, c. 280, which embodies a charter for the city of Pittsfield, the tenure of teachers in said city was governed by the provisions of G. L., c. 71, §§ 41 and 42, which read as follows: —

"Section 41. Every school committee, except in Boston, in electing a teacher or superintendent, who has served in its public schools for the three previous consecutive school years, other than a union or district superintendent, shall employ him to serve at its discretion; but any school committee may elect a teacher who has served in its schools for not less than one school year to serve at such discretion.

Section 42. The school committee may dismiss any teacher, but in every town except Boston no teacher or superintendent, other than a union or district superintendent, shall be dismissed unless by a two thirds vote of the whole committee. In every such town a teacher or superintendent employed at discretion under the preceding section shall not be dismissed unless at least thirty days prior to the meeting, exclusive of customary vacation periods, at which the vote is to be taken, he shall have been notified of such intended vote, nor unless, if he so requests, he shall have been given a statement by the committee of the reasons for which his dismissal is proposed; nor unless, in the case of a teacher, the superintendent shall have given the committee his recommendations thereon. Neither this nor the preceding section shall affect the right of a committee to suspend a teacher or superintendent for unbecoming conduct, or to dismiss a teacher whenever an actual decrease in the number of pupils in the schools of the town renders such action advisable. No teacher or superintendent who has been lawfully dismissed shall receive compensation for services rendered thereafter, or for any period of lawful suspension followed by dismissal."

St. 1932, c. 280, § 37, however, reads, as far as applicable, referring to the school committee: —

"Said committee shall annually appoint, but not of their own number, a superintendent of schools and such other subordinate officers, teachers and assistants, including janitors of school buildings as it may deem necessary for the proper discharge of its duties. . . ."

Said St. 1932, c. 280, § 37, provides in effect that teachers shall be appointed only for terms not in excess of one year. This provision is entirely inconsistent with the terms of G. L., c. 71, relative to an election of a teacher "to serve at its" (the school committee's) "discretion," as the quoted words are used in said chapter 71, sections 41 and 42. As used in said sections 41 and 42 the phrases "serve at its discretion," "to serve

at such discretion" and "employed at discretion" connote employment not for a period with a fixed and definite maximum length, but for an indefinite period. Hence, the provisions of said G. L., c. 71, §§ 41 and 42, with relation to the tenure of teachers who are chosen to serve at discretion, have no application to teachers appointed annually, as those functioning under the newly adopted charter of Pittsfield are to be. In other words, the terms of said section 41 and at least the second sentence of said section 42, are rendered ineffective as to the teachers of Pittsfield by the passage and adoption of said St. 1932, c. 280, when it becomes fully effective as described in its section 46.

Teachers have no such vested interest in the tenure of their offices that the same may not be altered or destroyed by an act of the Legislature, so that teachers elected prior to the passage of said chapter 280 will be in no different case than others after the act becomes effective in this respect.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Insurance — Life Policy — Lapses.

Addition to the face amount of a policy provided by a policy may by the terms of the policy itself be made unavailable after a lapse for non-payment of premium.

DEC. 2, 1932.

Hon. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — (1) You have informed me that you have before you for approval or disapproval a certain policy form of a domestic life insurance company, and that to aid you in the discharge of your duty in this matter you desire my opinion upon the following question of law: —

"May a domestic life insurance company lawfully provide in a policy of life insurance that is subject to section 144 of chapter 175 of the General Laws that the face amount of the policy shall be increased annually by a certain percentage of the premiums previously paid by the insured thereon, but that the amount of the paid-up insurance granted under such a policy shall not subsequently be increased annually by the addition of a proportionate part of the amounts by which the original face of the policy would have been increased if it had remained in force?"

You advise me that the particular portion of the policy form, as to the propriety of which you are in doubt, reads: —

"'If the death of the insured should occur while this policy is in force under its original premium paying conditions . . . a sum equal to twenty-five per cent of previous premiums paid . . . plus interest compounded annually at three and one-half per cent on such twenty-five per cent from the respective anniversary premium dates hereunder to the end of the policy year in which death occurs, shall be payable as an addition to the face amount of this policy. If this policy lapses no further additions shall be made to the sum insured.'"

And you state the particular matter connected therewith, which has made your decision as to your appropriate action difficult for you, to be: —

"A question has arisen as to the legality of said Provision B in so far as it provides that the amounts by which the face amount of the policy

is to be increased shall not be available after the policy has lapsed for non-payment of the premium thereon."

The holder of a policy of life insurance issued by a domestic life insurance company is entitled among other benefits by the provisions of G. L. (Ter. Ed.), c. 175, § 144, to paid-up insurance "payable at the same time and on the same conditions as in the original policy." The mode for determining the amount of the paid-up policy is set forth in said section 144 and I assume, since you do not advise me to the contrary, that the said policy form does not differ therefrom in any other particulars than those found in the quoted portion of the policy form. There is no statutory prohibition of the insertion in the original policy of insurance of a provision that such additions to the face amount of the policy, as are set forth in the portion of the instant form above quoted, may not be discontinued after a lapse of the policy.

If such a provision were not contained in the original policy it could not be enforced upon the holder of a paid-up policy after a lapse. To do so would be to construe the paid-up policy as something other than paid-up insurance "payable at the same time and on the same conditions as in the original contract." It does not follow, however, that an original policy providing for the cessation of such additions to the face of the policy as are mentioned in the quoted portion of the form may not be made, nor can such provisions of an original policy be taken to be a waiver by the insured of any of the provisions of said chapter 175, which waiver would be void by virtue of section 22B of said chapter 175, for the right to payment under the peculiar conditions contained in the quoted portion of the form inures to the assured not by virtue of any statute, but flows solely from the contract itself. See *Orr* v. *Prudential Insurance Co.*, 274 Mass. 216–217.

I answer your first question, above set forth, in the affirmative.

(2) The second question which you have propounded in your communication does not deal with any matter before you and is purely hypothetical. I must therefore respectfully decline to answer it.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Division of the Blind — Blind Workmen — Furnishing Medical Attention.

DEC. 8, 1932.

Dr. PAYSON SMITH, *Commissioner of Education.*

DEAR SIR: — You have asked my opinion with relation to blind men employed by the Commonwealth through the Division of the Blind, as workmen in the workshop maintained by said division, as follows: —

"I respectfully request your opinion as to whether under the provisions of section 23, chapter 69 of the General Laws the Division of the Blind may supply the necessary medical attention for any blind workman in said shop who may be injured in the course of his employment."

G. L. (Ter. Ed.), c. 69, § 23, reads as follows: —

"The director may ameliorate the condition of the blind by devising means to facilitate the circulation of books, by promoting visits among the aged or helpless blind in their homes, by aiding individual blind persons with money or other assistance, or by any other method he may

deem expedient; provided, that he shall not undertake the permanent support or maintenance of any blind person."

I am of the opinion that under the terms of said section 23 you have authority to supply the necessary medical attention for any blind workman who may be injured in the course of his employment.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Conservation — Fish and Game Wardens — Transfer.

A fish and game warden may be transferred from one district to another with no change in character of duties or in compensation without violating G. L., c. 31, § 43.

DEC. 8, 1932.

Hon. WILLIAM A. L. BAZELEY, *Commissioner of Conservation.*

DEAR SIR: — You have requested my opinion in a letter as follows: —

"In the Division of Fisheries and Game of this Department, it has been customary to transfer fish and game wardens from one district to another when the needs of the service required such action.

Such a transfer does not involve a change in duties or compensation, but merely change in the location in which the warden performs his work.

We have recently had an objection raised on the point that such transfers within the warden force without the approval of the wardens transferred were in violation of section 43 of chapter 31 of the General Laws (Ter. Ed.) This section includes the phrase 'or without his consent transferred from such office or employment to any other'.

It is our contention that the transfer of a warden from one district to another with no change in duties or compensation is not contrary to the provisions of the section above referred to and that the wardens may be transferred under such circumstances to any part of the Commonwealth.

We maintain the same contention in regard to Game Culturists and Fish Culturists who work at Game Farms and Fish Hatcheries and believe that they also can be transferred from one game farm or fish hatchery to another, provided there is no change in duties or compensation.

I would respectfully request your opinion in regard to these matters."

In my opinion, your contention as set forth in your letter is correct. A transfer such as you describe as merely "from one district to another with no change in duties or compensation" does not cause an officer or employee of the Commonwealth to be "transferred" from the "office or employment" which he holds to another, as the quoted words are used in G. L. (Ter. Ed.), c. 31, § 43, which reads: —

"Except as otherwise provided in this chapter, every person holding office or employment in the classified public service of the commonwealth, or of any county, city or town thereof, shall hold such office or employment and shall not be removed therefrom, lowered in rank or compensation or suspended, or without his consent transferred from such office or employment to any other, except for just cause, and for reasons specifically given him in writing within twenty-four hours after such removal, suspension, transfer or lowering in rank or compensation.

If within three days thereafter, the person sought to be removed, suspended, lowered or transferred shall so request in writing, he shall be

given a public hearing in not less than three nor more than fourteen days after the filing of the request, by the officer or board whose action affected him as aforesaid, and he shall be allowed to answer the charges preferred against him, either personally or by counsel, and shall be notified, in writing within three days after the hearing, of the decision of such officer or board. In default of such hearing, said person shall forthwith be reinstated. A copy of said reasons, notice, answer and decision shall be made a matter of public record in the department."

Upon the facts as you set them forth there is no transfer from the office or in the employment which the public servant holds, but a mere change in the place where he performs the duties of his office or of his employment; and there is no prohibition against such a change made without the officer's or employee's consent in the administration of the work of a department contained in the said chapter 31, section 43.

It is obvious that in carrying on the work of a State department transfer of workers from one locality to another may be necessary, and there is nothing in the said chapter 31, section 43, which indicates a legislative intention to forbid such practice under the conditions set forth in your letter.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Director of Standards — Treasury — License Fees.

Out of each fee for a hawker's and pedler's license one dollar should be paid into the treasury of the Commonwealth and the balance may be retained by the Director of Standards until the time for payment thereof to the appropriate city or town.

DEC. 19, 1932.

HON. CHARLES P. HOWARD, *Chairman, Commission on Administration and Finance.*

DEAR SIR: — Your Commission has requested my opinion as to whether the Director of Standards is required to pay into the treasury of the Commonwealth money received by him for certain licenses fees under G. L., c. 101, § 22.

This statute provides for the granting by the Director of hawkers' and pedlers' licenses and for the payment to the Director of fees therefor scheduled according to the population of the towns in which such licenses are to be exercised. The statute states: —

"The director shall retain one dollar for every city and town named in each of the above described licenses, and shall pay over to the treasurers of the respective cities and towns at least semi-annually the balance of said fees so received."

Article 125 of the Rearrangement of the Constitution is as follows: —

"All money received on account of the commonwealth from any source whatsoever shall be paid into the treasury thereof.

No moneys shall be issued out of the treasury of this commonwealth, and disposed of (except such sums as may be appropriated for the redemption of bills of credit or treasurer's notes, or for the payment of interest arising thereon) but by warrant under the hand of the governor for the time being, with the advice and consent of the council, for the necessary defence and support of the commonwealth; and for the protection and

preservation of the inhabitants thereof, agreeably to the acts and resolves of the general court."

In my opinion, the one dollar portion to be retained out of the fees is "received on account of the commonwealth," and such sums should, in accordance with the provisions of the Constitution above referred to, be paid into the Treasury. The balance of the fees, however, is in a different class. This balance is collected by the Director for the benefit and account of the cities and towns. The statute imposes upon the Director the duty of paying it over to the cities and towns, and the times and amounts of such payments, subject to the qualification that payments must be at least semi-annually, are for the Director to determine. It would seem, therefore, that the Director was entitled to keep the money in his control. In my opinion, the sums payable to the cities and towns are not "received on account of the commonwealth," within the meaning of the Constitution.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

County Commissioners — Sheriff — House of Correction.

County commissioners may approve bills for the equipment with furniture of quarters for a sheriff as keeper of a house of correction.

DEC. 19, 1932.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR: — You have asked my opinion upon a question of law in the following language: —

"In connection with the auditing of county accounts, the Director of Accounts would like to be advised as to the extent to which he may approve bills on account of the purchase of furniture and household equipment for the quarters occupied by the sheriff as master and keeper of the jail and house of correction.

. . . . . .

This statute states that the sheriff as master and keeper of the jail and house of correction shall be entitled to rent. The question has arisen as to whether the term 'rent' is broad enough to permit the county commissioners to furnish and equip, by the purchase of furniture and other household equipment, the quarters occupied by the sheriff as master and keeper of the jail and house of correction."

G. L. (Ter. Ed.), c. 37, § 17, provides: —

"The salaries of sheriffs shall be paid by their respective counties and shall, except as hereinafter provided, be in full compensation for all services rendered both as sheriff and as master or keeper of the jail or house of correction. If a sheriff elects to act as master or keeper of the jail or house of correction and resides thereat, he shall be entitled to rent, heat and light, and such subsistence as he may desire out of the regular subsistence rations purchased for prisoners. The sheriff of Dukes and of Nantucket county may, in addition to his salary, retain to his own use the fees received by him for service of process."

G. L. (Ter. Ed.), c. 126, § 8, provides: —

"The county commissioners in each county, except Dukes, shall at the expense of the county provide a house or houses of correction, suitably

and efficiently ventilated, with convenient yards, workshops and other suitable accommodations adjoining or appurtenant thereto, for the safe keeping, correction, government and employment of offenders legally committed thereto by the courts and magistrates of the commonwealth or of the United States."

If the county commissioners maintain quarters to be occupied by the sheriff, free of rental, as master and keeper of the jail and house of correction, such quarters may well be considered a part of the "house or houses of correction . . . and other suitable accommodations," as those words are used in said chapter 126, section 8, and if their equipment with furniture and other household goods of a like nature is, as a matter of fact, necessary to make such quarters proper for the sheriff and his family to live in, the purchase of such equipment when necessary is not an improper expenditure of money. The fact that said G. L., c. 37, § 17, specifically provides that the sheriff shall be entitled to "rent, heat and light" and certain designated subsistence does not impliedly forbid the furnishing of the quarters provided for him and his family so that they shall be suitable to live in with reasonable convenience. I do not think that the intention of the Legislature was to provide that only quarters, bare of proper household furniture, should be maintained for the sheriff, in view of the language of G. L. (Ter. Ed.), c. 126, § 8, with relation to the furnishing of "suitable accommodations" in connection with houses of correction. See II Op. Atty. Gen. 613, 614.

Just what furniture or equipment is necessary for the furnishing of such suitable accommodations provided for the sheriff as keeper and his family, and what is unnecessary or excessive, are questions of fact to be passed upon in the first instance by the county commissioners, and thereafter by the Director of Accounts in the pursuance of his duties; they are not questions of law nor are they within the province of the Attorney General to determine.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

State Farm — Superintendent — Medical Director.

The superintendent of the State Farm may appoint and remove the medical director of the Bridgewater State Hospital.

DEC. 27, 1932.

Dr. A. W. STEARNS, *Commissioner of Correction.*

DEAR SIR: — In a recent communication you have requested my opinion upon the following matter: —

"The present superintendent of the State Farm is anxious to receive an opinion as to whether or not, under the statutes, he has the privilege of displacing the present incumbent of the position of medical director and appointing one of his own choice.

. . . . . .

He also wishes to know if the discharge of the present medical director requires the approval of the Commissioner of Correction."

The superintendent of the State Farm is authorized to appoint the medical director of the Bridgewater State Hospital, with the approval of the Commissioner of Correction.

G. L. (Ter. Ed.), c. 125, § 48, reads as follows: —

"The Bridgewater state hospital shall be part of the state farm, and the superintendent thereof shall, with the approval of the commissioner, appoint a physician as medical director. The medical director shall have the care and custody of the inmates thereof and govern them in accordance with regulations approved by the commissioner."

Such medical director is a subordinate officer of the State Farm and holds office at the pleasure of the superintendent of the State farm.

G. L. (Ter. Ed.), c. 125, § 4, reads as follows: —

"All subordinate officers and employees in the several institutions shall be appointed by the warden or superintendent thereof and hold office during the pleasure of said warden or superintendent. Appointments in the prison camp and hospital, state prison colony and state farm shall be subject to the approval of the commissioner."

The said superintendent may therefore remove such medical director for any cause which in the exercise of his sound judgment and discretion renders such action necessary for the good of the Commonwealth's institutions in his charge, and if such subordinate officer is unfaithful or incompetent or uses intoxicating liquor as a beverage the superintendent's duty is to remove him forthwith.

G. L. (Ter. Ed.), c. 127, § 12, reads as follows: —

"An officer of the state prison who holds his place at the pleasure of the warden, or an officer or employee of the state prison colony, Massachusetts reformatory, reformatory for women, prison camp and hospital or state farm who holds his place at the pleasure of the superintendent, who is unfaithful or incompetent, or who uses intoxicating liquor as a beverage, shall be forthwith removed by him."

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Hunting — Deer — Artificial Light — Rifle.

DEC. 31, 1932.

HON. WILLIAM A. L. BAZELEY, *Commissioner of Conservation.*

DEAR SIR: — You have asked my opinion upon two questions, "in view of possible cases pending." If a determination of these questions is necessarily involved in proceedings before the courts it will ultimately be for judicial decision.

For your assistance in prosecuting such cases I will advise you to the effect that, in my opinion, no offense is committed under G. L. (Ter. Ed.), c. 131, § 104, by a person hunting with the aid or use of an artificial light, if such person does not in fact take a mammal as a result of such aid or use. It is also my opinion that an owner or occupant of land hunting a deer "which he has reasonable cause to believe has damaged or is about to damage crops," as set forth in section 108 of said chapter 131, is not forbidden by the terms of section 109 of said chapter 131 to hunt such deer with a rifle, and may do so lawfully, but that he is prohibited by said section 104 from killing such a deer by the aid or use of an artificial light.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Hunting and Fishing Licenses — Payment of Fees — Town Clerks.

Dec. 31, 1932.

Hon. William A. L. Bazeley, *Commissioner of Conservation.*

Dear Sir: — You have asked my opinion upon the following questions relative to the performance of your duties under G. L. (Ter. Ed.), c. 131, § 11, in auditing the record books relative to hunting and trapping licenses kept by city and town clerks under the provisions of said section 11.

(1) "Section 11, chapter 131 of the General Laws, as amended, requires that city and town clerks pay to the Division of Fisheries and Game all moneys received by them for various licenses sold in accordance with the provisions contained in section 6 of this chapter. Is a city or town clerk responsible personally to the Division of Fisheries and Game in accounting for moneys received from the sale of such licenses in cases where he has deposited his funds in a bank that may close before he has made his remittance in accordance with the above mentioned section?"

There may be circumstances under which a city or town clerk cannot be said to be personally liable for the funds described in your questions when deposited in a bank. An examination of all the facts surrounding any particular instance of such a deposit would be necessary to a determination as to such liability. This is a determination of mixed questions of law and fact which it is not within your authority to make. For the purpose of your audit the amount of such funds may be treated in the first instance as due to the Division of Fisheries and Game from the clerks who received the same.

(2) Your second question reads: —

"Is a city or town clerk personally responsible in accounting to the Division of Fisheries and Game in cases where he has sold licenses to non-residents for an amount that is less than that required by law — chapter 131, section 8, Acts of 1930 as amended by chapter 263, Acts of 1931?"

I answer this question in the affirmative.

Very truly yours,
Joseph E. Warner, *Attorney General.*

Public Health — Milk — Analyses as Public Records.

Jan. 13, 1933.

Dr. George H. Bigelow, *Commissioner of Public Health.*

Dear Sir: — You have asked my advice upon the following matter: —

"Will you kindly inform me whether or not the analyses of samples of milk obtained by milk inspectors, local boards of health, or by this department are the private property of the board or department, to be used for its own information and to be given out or withheld at its own discretion, provided that the results of the analyses are sent to the persons from whom taken as provided by statute."

An examination of the applicable statutes reveals no requirement by which such analyses or the results thereof, to which you refer, are required to be given to any person other than such persons as are specifically mentioned in the statutes as entitled to a return of the results of such analyses. Certain official publications of the department with relation to the analyses of adulterated articles of food are required by G. L., c. 111, § 25, to

be made at stated periods, but those I assume are of a different type from the analyses referred to in your letter.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Commissioner of Correction — Deputies — Term of Office.

The Commissioner has power to appoint and remove two deputy commissioners, subject to the approval of Governor and Council.

If not sooner removed, the deputies' terms end with that of the Commissioner who appointed them, but they may hold over until their successors are qualified.

JAN. 19, 1933.

Hon. FRANCIS B. SAYRE, *Commissioner of Correction.*

DEAR SIR: — You have addressed to me the following communication: —

"I should appreciate it if you would advise me whether or not G. L., c. 27, § 2, gives the Commissioner of Correction the privilege of appointing two deputies of his own selection. And if so, does section 2 require the approval of the Governor and Council of his action in removing the deputy commissioners who have been appointed by a preceding Commissioner."

G. L. (Ter. Ed.), c. 27, § 2, reads: —

"The commissioner may, with the approval of the governor and council, appoint and remove two deputy commissioners, and, with like approval, fix their compensation. The deputy commissioners shall perform such duties as the commissioner shall prescribe, and he may designate one of them to discharge the duties of the commissioner during his absence or disability."

1. The Commissioner of Correction has the power to appoint two deputies of his own selection, by virtue of G. L. (Ter. Ed.), c. 27, § 2, subject, however, to the approval of the Governor and Council. During his term of office he may remove such deputies whom he has so appointed, if such removal has the approval of the Governor and Council.

2. The terms of office of the two deputy commissioners appointed under said section 2, if they are not sooner removed, end with that of the Commissioner who appointed them. After the term of the Commissioner who appointed them has ceased, they remain in their official positions only until their successors are appointed by a new Commissioner and qualified. The appointment and qualification of their successors automatically ends their respective connections with their positions. If the Commissioner so appoints, with the approval of the Governor and Council, successors to such deputies and they qualify, no removal of such deputies has been made by the Commissioner, as the word "removal" is used in said section 2.

3. If, however, the Commissioner does in fact remove such deputies during the period of their hold-over, before their successors are appointed and qualified, an approval of such an actual removal must be given by the Governor and Council before the removal becomes effective.

The general principles of law applicable to your questions were laid down by the Supreme Judicial Court in *Opinion of the Justices*, 275 Mass. 575, 579, with particular relation to the first deputy auditor but with controlling effect in the instant matter.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Prisoners — Employment — Licenses.

An inmate of the State Prison Colony may by direction of the prison authorities operate without a license a steam shovel in an industry established at the colony.

JAN. 20, 1933.

Hon. FRANCIS B. SAYRE, *Commissioner of Correction.*

DEAR SIR: — You have requested my opinion as to whether or not an inmate of the State Prison Colony who holds a fourth-class license can operate a steam shovel while serving his sentence.

The provisions of law which relate to the employment of prisoners in industries at the State Prison Colony are contained in G. L. (Ter. Ed.), c. 127, § 51, which provides, in part, as follows: —

"The commissioner and the warden of the state prison, the superintendent of the Massachusetts reformatory, reformatory for women, prison camp and hospital, state prison colony or state farm, keepers or masters of jails and houses of correction, shall determine the industries to be established and maintained in the respective institutions under the control of said officers. The prisoners in said institutions shall be employed in said industries under regulations which shall be established by the commissioner; . . . ."

The provisions relative to licensing of operators of steam shovels are contained in G. L. (Ter. Ed.), c. 146, §§ 46–49, inclusive.

The Legislature has entrusted the employment of inmates in industries at the State Prison Colony to the Commissioner and the superintendent of the State Prison Colony subject to regulations established by the Commissioner. I assume from the tenor of your letter that the use of a steam shovel is to be in connection with an industry established under the terms of the statute, and that it is an industry, directly connected with property of the Commonwealth itself, in which inmates of the State Prison Colony are employed. In carrying out such employment on the property of the State Prison Colony the Commissioner and the superintendent act as agents of the Commonwealth and are exercising domination over property of the Commonwealth. The general law made for the regulation of citizens in regard to the operation of steam shovels must, under general principles of statutory interpretation, be held to be subordinate to the special statute placing in the Commissioner and the superintendent the complete jurisdiction over the establishment and maintenance of industries and the employment of inmates therein at the State Prison Colony. No such provision to the contrary is to be found in the applicable statute. It is not to be assumed that in the absence of such a special provision the Legislature intended to give to licensing officials authority to control or interfere with the reasonably necessary efforts of the Commissioner and the superintendent to perform their duties as agents of the Commonwealth. *Teasdale* v. *Newell & Snowling Construction Co.*, 192 Mass. 440, 443; I Op. Atty. Gen. 290; II *ibid.* 56 and 399; V *ibid.* 49 and 109; Attorney General's Report, 1932, p. 86.

In my opinion, therefore, it is not necessary for an inmate of the State Prison Colony to have a license to operate a steam shovel before being employed in that capacity in an industry at the State Prison Colony.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Civil Service — Brookline Contagious Hospital — Superintendent.

Feb. 2, 1933.

Hon. Paul E. Tierney, *Commissioner of Civil Service.*

Dear Sir: — You request my opinion as to whether the position of superintendent of the Brookline Contagious Hospital is exempted from classification under civil service by Civil Service Rule 4, which exempts from classification "the superintendents, and deputy superintendents of penal, reform and charitable institutions not specifically included by statute." I understand that there is no statute providing for the inclusion of the position here in question. The question then is whether the hospital is "a charitable institution" within the meaning of the rule. In my opinion it is. According to the information furnished me, substantially all the patients pay nothing. The fact that charges are occasionally made to patients who can afford to pay is immaterial. See *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432.

Accordingly, I advise you that the position here in question is not under civil service.

Yours very truly,
Joseph E. Warner, *Attorney General.*

Physician — Registration — Qualifications — Certificates.

Intervening vacations are not to be counted in computing the time of a course of instruction necessary to a degree in a medical college attended by an applicant for registration as a physician.

The validity of a physician's registration does not depend upon whether he was qualified to be examined if he in fact secured a certificate of registration, though the same may be revocable.

Feb. 6, 1933.

Board of Registration in Medicine.

Gentlemen: — You request my opinion (1) as to whether the phrase "a full four years' course of instruction of not less than thirty-six weeks in each year," as used in G. L., c. 112, § 2, is to be construed as meaning that there must be offered thirty-six weeks of actual instruction during each year; and (2) whether, if the first question is answered in the affirmative, certificates of registration which may in the past have been granted by the Board to graduates of medical schools which did not in fact give thirty-six weeks of actual instruction are invalid, so that legislation is necessary to validate them.

Said section 2 reads, in part, as follows: —

"Applications for registration as qualified physicians, signed and sworn to by the applicants, shall be made upon blanks furnished by the board of registration in medicine, herein and in sections three to twenty-three, inclusive, called the board. Each applicant, who shall furnish the board with satisfactory proof that he is twenty-one or over and of good moral character, that he possesses the educational qualifications required for graduation from a public high school, and that he has received the degree of doctor of medicine, or its equivalent, either from a legally chartered medical school having the power to confer degrees in medicine, which gives a full four years' course of instruction of not less than thirty-six weeks in each year, or from any legally chartered medical school having such power, if such applicant was, on March tenth, nineteen hundred and

seventeen, a matriculant thereof, shall, upon payment of twenty-five dollars, be examined, and, if found qualified by the board, be registered as a qualified physician and entitled to a certificate in testimony thereof, signed by the chairman and secretary."

Said section further provides: —

"The board, after hearing, may revoke any certificate issued by it and cancel the registration of any physician convicted of a felony; or, after hearing, may revoke any certificate issued by it and cancel for a period not exceeding one year, the registration of any physician, who has been shown at such hearing to have been guilty of . . . aiding or abetting in any attempt to secure registration, either for himself or for another, by fraud; . . ."

Your first question I answer in the affirmative. The statute seems unambiguous. The thirty-six weeks referred to must be weeks of instruction. Intervening vacation periods are not to be included.

As to your second question, the certificates of registration referred to are not, in my opinion, invalid. According to the terms of the statute, the right to registration depends upon the examination and not upon the question of qualification to take the examination. That question has been previously presented and determined. The two things are distinct. The validity of a physician's registration does not, in my opinion, depend upon whether he was in fact qualified to be examined. He furnished proof which satisfied the Board that he was entitled to be examined, and that was all that he was required to do. This view is confirmed by the fact that the statute further provides for revocation of certificates by the Board after hearing, for certain stated causes, including fraud in securing registration. This shows that it was intended that a registration once issued should be valid until revoked.

Accordingly, in my opinion, no legislation is necessary in order to legalize the certificates of registration to which you refer.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Retirement System — Election — Former Employee.

A person who has been retired from the public service may not vote at the election of a member of the State Board of Retirement.

FEB. 7, 1933.

HON. CHARLES F. HURLEY, *Chairman, State Board of Retirement.*

DEAR SIR: — You request my opinion as to whether a former State employee who has been retired under the retirement system is entitled to vote at the election of a member of the State Board of Retirement.

It is provided by G. L. (Ter. Ed.), c. 10, § 18, that one member of the Board shall be "elected by the state retirement association established under section two of chapter thirty-two from among their number . . ." Said section 2 provides: —

"There shall be a retirement association for the employees of the commonwealth, including employees in the service of the metropolitan district commission, organized as follows: . . ."

This provision, so far as it goes, restricts membership in the association to "employees," and I find nothing elsewhere in the act which seems to affect or change this result.

"Employees" are defined in section 1 as —

"persons permanently and regularly employed in the direct service of the commonwealth or in the service of the metropolitan district commission, whose sole or principal employment is in such service."

A person who has been retired does not come within this definition of employees, and is accordingly, in my opinion, not a part of the association, within the meaning of said section 2, and is not entitled to vote for a member of the Board under G. L. (Ter. Ed.), c. 10, § 18.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Constitutional Law — Payment of Wages — Contractors.

FEB. 23, 1933.

HON. GEORGE W. KNOWLTON, Jr., *Senate Chairman, Committee on Public Service.*

DEAR SIR: — You have requested me on behalf of your committee to give my opinion as to the constitutionality of House Bill No. 1054, if enacted into law.

The proposed measure is entitled "An Act relative to the employment of mechanics, teamsters, chauffeurs and laborers on public works," and amends sections 26 and 27 of G. L., c. 149.

The Supreme Judicial Court recently held in *Commonwealth* v. *Daniel O'Connell's Sons, Inc.*, 281 Mass. 402, that section 26, so far as it purports to make it a crime for a contractor on public works to pay "less than the prevailing rate of wages for a day's work in the same trade or occupation in the locality," is unconstitutional upon the ground of indefiniteness. The proposed act (by amendment to section 27) contains the same prohibition, but with added changes and qualifications. A significant change is that a violation of the prohibition is no longer, at least in the first instance, a crime. Instead, provision is made in the case of a dispute for an investigation by the Department of Labor and Industries and a determination by that department of what is the customary and prevailing rate of wages in the locality. After such determination the contractor is made criminally liable for paying less than the amount so determined; but the proposed act, unlike the present statute (section 26), does not purport to impose any criminal liability prior to such determination. In addition, the proposed act defines the terms "customary and prevailing rate of wages" and "locality," which were held in the O'Connell case to be indefinite. The question to be investigated and determined by the department seems to be fixed with a sufficient degree of definiteness. For these reasons the objections raised in the O'Connell case do not, in my opinion, apply. I think the act is constitutional.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Forfeitures — Motor Vehicles — Liquor Law.

An automobile forfeited as a container or implement for the illegal sale of liquor is to be sold only under order of a court.

Feb. 28, 1933.

Hon. Francis X. Hurley, *Auditor of the Commonwealth.*

Dear Sir: — You request my opinion as to how automobiles seized as containers or implements of sale of liquors contrary to law and in the possession of the State Police should be kept or disposed of. You also ask what, if any, change has been made in the law relating to this matter since January 1, 1927.

Prior to a final court order of forfeiture or return the officer making the seizure of an automobile should "securely keep the same" until such final action by the court. This was the law on January 1, 1927, and still is (G. L., c. 138, §§ 61, 64; G. L. (Ter. Ed.), c. 138, §§ 61 and 64).

As to disposition after a final order of forfeiture, the statutory provisions affecting motor vehicles were changed by St. 1929, c. 329. Prior to this statute the law was as follows: If the court determined a motor vehicle to be a vessel in which liquor was "contained" (G. L., c. 138, §§ 61 and 64), the statute provided that such vessel, like the intoxicating liquor contained therein, should be forwarded upon written order of the court to the Commissioner of Public Safety, who should either destroy such vessel or cause it to be sold, according to which course "in the judgment of the Commissioner" was for the best interests of the Commonwealth, the proceeds of the sale to be paid into the treasury of the Commonwealth (G. L., c. 138, § 69, as amended by St. 1923, c. 329; *cf. E. J. Fitzwilliam Co.* v. *Commonwealth,* 258 Mass. 103; VIII Op. Atty. Gen. 525). If a motor vehicle were determined by the court to be an implement of sale, the statute provided that it should be disposed of in the manner provided for the forfeiture and disposition of intoxicating liquors, *i.e.*, forwarded to the Commissioner under the provisions of section 69; but with the added proviso that the court might order the destruction or sale of the property by any officer qualified to serve criminal process, the proceeds of a sale to be paid to the county (G. L., c. 138, § 71). It appears, therefore, that these statutory provisions required a forfeited automobile to be destroyed or sold, either by order of the court under section 71, or by determination of the Commissioner of Public Safety where such automobile had been forwarded to him by order of the court under the provisions of section 69.

By St. 1929, c. 329, special provision was made for the disposition of forfeited motor vehicles as distinguished from other containers or implements of sale. This act provides, by amendment of G. L., c. 138, § 68, that where a motor vehicle has been held to be a container or implement of sale contrary to law the court "shall, unless good cause to the contrary is shown, order a sale," the net proceeds to be turned into the treasury of the Commonwealth. Section 71 was also amended by providing that "the provisions of this section shall not apply to a motor vehicle if seized and held to be an implement of sale as aforesaid, but the disposition of such a motor vehicle shall be governed by the provisions of section sixty-eight." Thus section 69, providing for the forwarding of a forfeited automobile to the Commissioner for disposition by him either by destruction or sale, became inoperative. As the law now stands the disposition

of a forfeited automobile is governed solely by the provisions of section 68, as amended, *i.e.*, such automobile is to be sold under order of the court.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

State Boxing Commission — Members' Traveling Expenses.

An appointive member of the State Boxing Commission is not entitled to reimbursement for expenses of travel between his home and the Commission's office.

MARCH 9, 1933.

Gen. ALFRED F. FOOTE, *Commissioner of Public Safety.*

DEAR SIR: — You request my opinion as to whether, under G. L., c. 22, § 12, an appointive member of the State Boxing Commission is entitled to expenses incurred in traveling between his home and the office of the Commission in the State House.

Said section 12 provides that the State Boxing Commission shall consist of the Commissioner of Public Safety, *ex officio*, as chairman, and of two appointive members; that the appointive members shall receive such salaries, not exceeding $3,500 each, as the Governor and Council shall fix. The section then provides: "The members shall receive their traveling expenses necessarily incurred in the performance of their duties, and the commission shall be allowed such sums for clerical assistance as the governor and council may approve."

In my opinion, the Legislature did not intend the phrase "traveling expenses necessarily incurred in the performance of their duties" to include the expense incurred by a member in getting from his home to the office of the Commission, or in returning home again. It is not usual to allow such expenses, and in the absence of clear language to the contrary the statute should not be construed as providing for such an allowance. The words used in the statute do not seem to me to evince an intent that such expenses should be paid. It may well be contemplated that the members of the Commission might be required to travel to different places in the State in the performance of their duties, and, in my opinion, it is to such traveling expenses that the statute refers. Moreover, this view is in accord with an opinion given some years ago by one of my predecessors in connection with a similar statute (I Op. Atty. Gen. 199).

Accordingly, I answer your question in the negative.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Licenses — Steam Boilers and Engines — Engineers.

A certain type of steam turbine engine may be operated without the direction of a licensed engineer.

MARCH 13, 1933.

Mr. JOHN H. PLUNKETT, *Director, Division of Inspection, Department of Public Safety.*

DEAR SIR: — You request my opinion as to whether a certain type of steam turbine engine can be operated except under the direction of a licensed engineer. G. L., c. 146, § 46, provides, in part: —

"No person shall have charge of or operate a steam boiler or engine or its appurtenances, except boilers and engines upon locomotives, motor vehicles, boilers and engines in private residences, boilers in apartment houses of less than five apartments, boilers and engines under the jurisdiction of the United States, boilers and engines used for agricultural purposes exclusively, boilers and engines of less than nine horse power, and boilers used for heating purposes exclusively which are provided with a device approved by the commissioner limiting the pressure carried to fifteen pounds to the square inch, unless he holds a license as hereinafter provided."

Section 48 provides, in part: —

"A steam turbine engine shall be rated at less than nine horse power when the external diameter of the steam supply pipe does not exceed one and three fourths inches, at fifty horse power when it exceeds one and three fourths inches and does not exceed three and one half inches, and at one hundred and fifty horse power when it exceeds three and one half inches and does not exceed five inches."

The engines in question are to be used in place of electrical motors for providing the motor power necessary to operate a vacuum pumping system in connection with steam heating apparatus. The boilers which supply the pressure for operating these engines are solely boilers used for heating purposes exclusively and which are equipped with an approved device limiting the pressure to 15 pounds to the square inch, as provided for in section 46. It seems to be agreed that in fact no additional danger can be involved in using the engines in connection with such boilers. The difficulty arises from the fact that the steam supply pipe of these engines exceeds $1\frac{3}{4}$ inches in external diameter, and so, under the terms of section 48, gives the engine a rating in excess of 9 horse power, and thereby may seem to put them in a class for which a licensed engineer is required under the provisions of section 46. However, in my opinion, section 46 is not to be construed as applying to engines used solely in connection with boilers which are themselves regulated by the statute. In the cases where the section regulates engines it regulates the boilers as well. The phrase in each case is "boilers and engines." It is provided that no engineer is required for boilers used for heating purposes exclusively which are provided with a device approved by the Commissioner limiting pressure carried to 15 pounds. The boiler, or source of the power, being thus approved, there seems no reason for regulating an engine used solely in connection therewith; and the statute does not, in my opinion, purport to do so.

The framers of the law, so far as it limits the horse power of a steam engine, seem to have been concerned only with operating pressure, for no regulation was made of other kinds of engines. Thus gasoline engines, Diesel engines, etc., could be used in connection with the low pressure heating boilers here in question, however great the horse power of such engines might be. There appears to be no reason why steam engines getting their pressure solely from such boilers should not equally be used; and, as before stated, I think the statute need not and should not be construed as prohibiting such use.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Motor Vehicles — Taxes — United States Reservations.

Automobiles customarily kept on United States reservations are not liable to an excise tax.

March 14, 1933.

His Excellency Joseph B. Ely, *Governor of the Commonwealth.*

Sir: — You request my opinion as to the taxability, under the existing laws of the Commonwealth, of registered automobiles owned by the United States Army personnel quartered within Fort Devens and other military reservations under the exclusive jurisdiction of the United States.

G. L. (Ter. Ed.), c. 60A, § 1, provides that "there shall be assessed and levied in each calendar year on each motor vehicle registered under the provisions of chapter ninety and customarily kept within the commonwealth, for the privilege of operating such motor vehicle upon the highways during such year, an excise tax upon the value thereof, . . ."

The statute by its terms imposes an excise only in respect to the use of automobiles which are "customarily kept within the commonwealth." The reservations to which you refer as being within the exclusive jurisdiction of the United States cannot be said to be "within the commonwealth," as these words are used in the statute.

If, therefore, the automobiles to which you refer are "customarily kept" on the reservations, the statute makes no provision for a tax. Whether they are so kept involves questions of fact, which, of course, I cannot determine.

Very truly yours,
Joseph E. Warner, *Attorney General.*

State Prison Colony — Disposition of Receipts from Labor.

The receipts from labor at the State Prison Colony are to be dealt with in the same manner as in other penal institutions under G. L., c. 127, § 71.

March 16, 1933.

Hon. Francis B. Sayre, *Commissioner of Correction.*

Dear Sir: — You request my opinion as to whether the provisions of section 71 of G. L., c. 127, relating to the accounting for and disposition of receipts from prison labor, are applicable to the State Prison Colony.

Although the State Prison Colony is not named with the other institutions enumerated in section 71, which are "the state prison, the Massachusetts reformatory, the reformatory for women, the prison camp and hospital and the state farm," yet, in my opinion, the provisions of that section are made applicable to the State Prison Colony by G. L., c. 125, § 41E, which provides: —

"All provisions of law applying generally to the institutions under the control of the department of correction shall apply to the state prison colony."

The same sections of chapter 127 (§§ 51 *et seq.*) which provide for the establishment and conduct of prison labor in the institutions named in section 71 apply specifically to the State Prison Colony as well. The State Prison Colony being thus grouped with the other institutions in the sections providing for the conduct of prison labor, it certainly must have been intended, in the absence of some provision to the contrary,

that the receipts from such labor at the State Prison Colony should be handled in the same way as the receipts from the other institutions with which it is grouped. There is no reason for a differentiation. It seems likely that the failure, at the time of the establishment of the State Prison Colony (St. 1927, c. 289), to amend section 71 so as to include in terms the State Prison Colony was due to a supposition that the enactment of section 41E of G. L., c. 125 (St. 1927, c. 289, § 1), would take care of the matter, and, in my opinion, said section 41E is to be construed as having that effect.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Civil Service — Teachers — Exemptions.

"Playground Workers" of the city of Boston are to be classed as "public school teachers," so as to be exempted from the civil service laws as regards appointment.

MARCH 27, 1933.

Commissioners of Civil Service.

GENTLEMEN: — You request my opinion as to whether "playground workers" of the city of Boston, who perform services by virtue of St. 1907, c. 295, are "public school teachers" within the meaning of G. L., c. 31, § 5, which exempts from civil service the selection or appointment of "public school teachers."

The statute to which you refer (St. 1907, c. 295) reads as follows: —

"SECTION 1. The school committee of the city of Boston, within the limit of the appropriations for such purposes made by it as hereinafter authorized or under existing authority of law, shall, during the summer vacation and such other part of the year as it may deem advisable, organize and conduct physical training and exercises, athletics, sports, games, and play, and shall provide proper apparatus, equipment and facilities for the same in the buildings, yards and playgrounds under the control of said committee, or upon any other land which it may have the right to use for this purpose.

SECTION 2. The said committee shall use for the purposes aforesaid such of the playgrounds, gymnasia or buildings under the control of the park commission of said city as the school committee may deem suitable therefor, and may equip the same therefor, such use to be subject however to such reasonable regulations and conditions as the park commission may prescribe; *provided, also,* that such use shall not extend to any playground, gymnasium or building under the control of the park commission which said commission shall by vote approved by the mayor declare to be unsuitable for such use.

SECTION 3. Appropriations for the above-named purposes shall be made by the school committee in the same manner in which it makes appropriations for the support of the public schools, and the total amount of the appropriations which said committee is authorized by law to make is hereby increased for the current financial year of the city by two cents upon each one thousand dollars of the valuation on which the appropriations of the city council are based, and by two cents additional, or four cents in all, for each subsequent year; but the amount of said increase shall be appropriated solely for the purposes mentioned in this act.

SECTION 4. This act shall take effect upon its passage."

You do not state the duties of those to whom you refer as "playground workers." The act of 1907 is entitled "An Act to enlarge the powers of the school committee of the city of Boston in respect to physical education."

Section 306 of the rules and regulations promulgated by the school committee, entitled "Rules of the School Committee and regulations of the public schools of the city of Boston," reads, in part, as follows:

"1. Teachers in playgrounds and teachers of athletics shall consist of teacher coaches, teacher managers, supervisors of playgrounds, play teachers, first assistants in playgrounds, assistants in playgrounds, assistants in sand gardens, and teachers of dramatics and story-telling. There shall be as many teachers of these ranks as the School Committee may authorize."

I assume that the persons to whom your question refers are in fact engaged in teaching. The only question, then, is whether they are "public school teachers" within the meaning of section 5 of the civil service act.

In my opinion, said section 5 is to be construed as including the teachers here in question. It is true that under some statutes the term "public schools" has a limited meaning, which would not include the activities here involved. Thus in *Commonwealth* v. *Connecticut Valley St. Ry. Co.*, 196 Mass. 309, the statute requiring street railway companies to transport at a lower rate "pupils of the public schools," was construed as limited to schools which are part of our system of compulsory education. (This statute has since been amended to include public evening schools and vocational schools. G. L., c. 161, § 108.) But the question here is the construction of the phrase as used in the civil service exemption statute. In my opinion, it is the intention of that statute to give public school committees free choice in the matter of selecting teachers to carry out the educational work of such committees. Physical education, under the terms of St. 1907, c. 295, is part of the work of the school committee of the city of Boston. The same reason seems to exist for exempting from civil service the selection of teachers for this work that exists in connection with the selection of other teachers. Moreover, to construe the words "public school" as used in the civil service statute as having the limited meaning given those words in the statute before the court in *Commonwealth* v. *Connecticut Valley St. Ry. Co.*, *supra*, would have the effect of bringing within civil service the selection and appointment of many other teachers than those here in question. The appointment of all these teachers, including the teachers appointed under St. 1907, c. 295, has hitherto been regarded as exempt from civil service.

In my opinion, section 5 of G. L., c. 31, is not to be construed as requiring a change in this practice.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Armories — Entertainments — Licenses.

Licenses from municipal authorities are not required for entertainments lawfully given in State armories.

MARCH 30, 1933.

Brig. Gen. JOHN H. AGNEW, *The Adjutant General.*

DEAR SIR: — You have in effect asked my opinion as to whether persons using State armories, under the provisions of G. L. (Ter. Ed.), c. 33,

§§ 48–50, for certain nonmilitary purposes authorized by said section 48, duly approved by designated military authorities of the Commonwealth, must obtain licenses from municipal authorities if the use includes such forms of entertainment as, if conducted elsewhere, would require such licenses under the terms of G. L. (Ter. Ed.), c. 140, §§ 181 and 182.

I answer your inquiry to the effect that licenses from municipal authorities are not required under the designated conditions.

The custody and control of armories are vested in the Commonwealth and exercised by its authority through commissioners and other officers of the Commonwealth. The statutes with relation to the use of armories by persons for nonmilitary purposes [said G. L. (Ter. Ed.), c. 33, §§ 48–50] purport to make all appropriate regulations for their use. The statutes do not provide for the application of the General Laws concerning the licensing of certain entertainments by municipalities to such use.

It follows that, since the specific subject of the regulation of the nonmilitary use of armories has been apparently dealt with in full by the Legislature, without provision being made for the application of the general licensing authority of municipal authorities to such use of armory properties peculiarly within the control of the Commonwealth itself, it was not the intent of the Legislature in the enactment of statutes with relation to such use of armories to permit activities authorized by officials of the Commonwealth therein to be burdened by the licensing powers of local officials (IV Op. Atty. Gen. 537). The principle of law applies equally to an authorized use of an armory for nonmilitary purposes, whether such use be carried into effect by members of the National Guard or by nonmilitary persons. (See VI Op. Atty. Gen. 72; VIII *ibid.* 139.)

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Labor — Minors — Employment Certificates.

Employment certificates with relation to minors under sixteen are not required in connection with private domestic service and service on farms.

APRIL 10, 1933.

Hon. EDWIN S. SMITH, *Commissioner of Labor and Industries.*

DEAR SIR: — You have requested my opinion in a communication which, in part, reads as follows: —

"Section 65 of chapter 149 of the General Laws states in part:

'No person shall employ a minor under sixteen or permit him to work in, about or in connection with any establishment or occupation named in section sixty, or for which an employment certificate is required, for more than six days in any one week, or more than forty-eight hours in any one week, or more than eight hours in any one day, or, except as provided in section sixty-nine, before half past six o'clock in the morning, or after six o'clock in the evening. . . .'

In section 86, chapter 149 of the General Laws occurs the sentence —

'Children between fourteen and sixteen employed in private domestic service or service on farms shall be required to secure a special certificate issued by the superintendent of schools covering such employment.

The purpose of this letter is to request an opinion from you as to whether section 65, in its reference to occupations 'for which an employment cer-

tificate is required' would cover service on farms for children between fourteen and sixteen.

In connection with this inquiry, I would like to call your attention to the definition of employment in section 1 of chapter 149, which reads as follows:

'Employment', any trade, occupation or branch of industry, any particular method or process used therein, and the service of any particular employer; but it shall not include private domestic service or service as a farm laborer.' "

The term "special certificate," as used in section 86 in more than one instance, is not synonymous with "employment certificate," as used in section 65 and described in detail in section 87 of said chapter 149. See VII Op. Atty. Gen. 422.

It follows, then, that "private domestic service" and "service on farms" do not fall within the occupations for which an "employment certificate is required" of minors under sixteen, as described in said section 65, and the prohibitions relative to the hours of employment set forth in said section 65 have no relation to such minors in "private domestic service" and in "service on farms."

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Reclamation Board — Mosquito Control — Expenditures.

New petitions for the same local plans for mosquito control need not be filed each year by municipal officers.

APRIL 10, 1933.

Dr. ARTHUR W. GILBERT, *Commissioner of Agriculture.*

DEAR SIR: — I am in receipt from you of the following communication: —

"Chapter 307 of the Acts of 1932, approved on June 7, 1932, made an appropriation of $130,000 for carrying out mosquito control projects in accordance with chapter 112 of the Acts of 1931, in Item 245–b. This item states that no expenditure shall be made in a city or town unless a petition from the mayor or selectmen is received and approved by the State Reclamation Board.

Chapter 89, 1933, approved March 23, makes a further appropriation of $75,000 for the same work. A copy of Item B, as it appears in the act, is attached hereto. Presumably it is desired that this work start rather promptly. Petitions were made by the municipal authorities of several cities and towns under the 1932 act, and in several instances the work was not completed.

I desire your opinion as to whether or not the petitions filed in connection with Item 245–b of chapter 307 of the Acts of 1932 can be considered as petitions under the provisions of Item B of chapter 89 of 1933."

I am of the opinion that if a petition from a mayor or selectmen for mosquito control work has been made and approved in 1932 by the State Reclamation Board, money appropriated by St. 1933, c. 89, may be expended for such work in the same manner that it may be expended upon work as to which such petitions from municipal officers are filed subsequent to the passage of said St. 1933, c. 89.

The plan for mosquito control work, originated by St. 1931, c. 112, is a single and continuing scheme during the unemployment emergency. The fulfillment of specific local plans for such work, once approved by the Board, would appear to be a part of the whole undertaking. The appropriation of money from year to year by the Legislature for carrying out the undertaking as a whole would not seem to necessitate the filing of new petitions each year by municipal officers for the same local plans for the said work, nor does the language of St. 1933, c. 89, read in connection with the enactments of 1931 and 1932 appear to limit the expenditure of money appropriated for the general purposes of the whole undertaking merely to new local plans for such work petitioned for in 1933, but to include such local plans for such work as have been previously so petitioned for and approved but not yet completed.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Motor Vehicles — Tax — United States Reservation.

An automobile customarily kept on a United States reservation is not subject to an excise tax.

APRIL 21, 1933.

His Excellency JOSEPH B. ELY, *Governor of the Commonwealth.*

SIR: — Your Excellency has requested me to express an opinion on certain correspondence addressed to Your Excellency by the Major General of the United States Army commanding the First Corps Area, with relation to the collection of an excise tax on registered automobiles owned by the United States army personnel.

On March 14, 1933 (*ante*, p. 45), I transmitted to Your Excellency a written opinion relative to the law applicable to such a situation as is outlined by your correspondent, and stated therein that, if automobiles owned by the United States army personnel are "customarily kept" on the United States reservations, the statute, G. L. (Ter. Ed.), c. 60A, § 1, made no provision for a tax thereon. I also stated that whether such automobiles were so kept in any given case was a question of fact.

The mere fact that such an automobile was used during the greater part of the day outside the reservation, as set forth in the correspondence, would not of itself be sufficient to warrant a determination that such an automobile was not "customarily kept" on a United States reservation, if the further fact appeared, as suggested by your correspondent, that such automobile was customarily "housed" or garaged at night on a United States reservation where the owner thereof was quartered.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Railroads — Directors — Common Management of Two or More Railroads.

APRIL 25, 1933.

His Excellency JOSEPH B. ELY, *Governor of the Commonwealth.*

SIR: — You request me to give you an opinion as to the advisability of repeal of the laws preventing a director of any other railroad from being a director of the Boston and Maine Railroad or a director of the New York, New Haven and Hartford Railroad Company, which has been suggested

to you in a letter, a copy of which you enclosed, addressed to Your Excellency by J. J. Pelley, president of the New York, New Haven and Hartford Railroad Company.

The basis of this suggestion is representation that a common management of the Boston and Maine and New Haven properties would be in the public interest by the elimination of unnecessary expense, in line with the trend toward co-ordinative railroad effort as expressed, President Pelley says, by the New England Railroad Committee in its report to the Governors of the New England States in May, 1931, and in the report of the National Transportation Committee (the Coolidge Committee, so called), and that a common management could be promoted or effected by permitting directors of any other road to be directors in the Boston and Maine and in the New Haven and in both.

The specific suggestion is repeal of Spec. St. 1915, c. 380, § 25, and c. 383, § 7 (which prohibited interlocking railroad directorates).

The ability to express any opinion as to the advisability of repeal of these two statutes must necessarily be predicated upon an extensive study, whereby one may determine whether there should be abrogation of this form of railroad management control which has been exercised for eighteen years, and whether interlocking directorates would effect the economies, which it is represented to you, will ensue therefrom, and whether, as a matter of policy, even though immediate economies would be effected, it would be wise to restore interlocking directorships without assurance that there will be a restoration of those practices and dire consequences from which the people decreed emancipation in these statutes.

At the moment of receipt of your communication, congressional action had been invoked along proposals which seemed to indicate a vast change in the structure of railroad operations, and these proposals have thus become added incidents in the ascertainment of the efficacies so represented to be attainable, to enable any calculation as to the advisability of repeals.

In brief, section 25 of Spec. St. 1915, c. 380, and section 7 of Spec. St. 1915, c. 383, were inserted by the Legislature in furtherance of a program of reorganization of the railroad companies constituting the Boston and Maine Railroad system and of supervision of the New York, New Haven and Hartford Railroad Company, which Governor Walsh proposed as remedy, as he described, of a "deplorable condition" arising from railroad mismanagement.

To what extent these sections, prohibiting interlocking directorates, were not so integral a part of the entire legislation adopted to effect such program and its present continuance, as to be now safely excised therefrom, is dependent upon the extent which directors, if now released from this restriction, may so conduct themselves as to cease perpetrations which caused, in part, the disasters with which Governor Walsh so sagaciously dealt.

However, I present to you the origin of the legislation, which includes the sections, repeal of which is asked, in order that you may be more fully acquainted with its occasion.

Spec. St. 1915, c. 380, reorganized and consolidated the railroad companies constituting the Boston and Maine system. The original draft of this statute was prepared and submitted to the Legislature by Marcus P. Knowlton, Henry P. Day, Charles P. Hall, James L. Doherty and Frank P. Carpenter, trustees under a decree of the District Court of the United States for the Southern District of New York, to represent the interests

of the New York, New Haven and Hartford Railroad Company, the Boston Railroad Holding Company and the Boston and Maine Railroad. The original draft did not contain the provisions now found in section 25 of said chapter 380, but they were inserted in the bill during its passage. Just prior to its submission to the Legislature, Governor Walsh sent the following message to the General Court: —

"In my address to the General Court on January 7th I called your attention to the pressing need of legislation to enable the Boston and Maine Railroad to readjust its relations with the subsidiary lines leased and operated by it, and thereby to relieve its shareholders from an intolerable situation and to avert the disintegration of the system harmful alike to the public and the leased company.

The trustees of the railroad will shortly present to you a request for such enabling legislation as they consider desirable and practicable; and I urge upon you the great importance of giving their recommendations your immediate and careful attention."

Spec. St. 1915, c. 383, was an act relative to the capitalization of the New York, New Haven and Hartford Railroad Company and the further supervision of said company by the Commonwealth. This act was under consideration by the Legislature at the same time as chapter 380. Chapter 380 was approved on June 1, 1915, and chapter 383 was approved on June 4, 1915. The original draft of chapter 383 did not contain the provisions now found in section 7 but they were inserted during its passage.

It is quite apparent that the insertion of section 25 in chapter 380 and section 7 in chapter 383 was the result of the insistence of Governor Walsh that the Legislature take definite steps to remedy the intolerable situation which existed in this State with respect to the two railroad systems. Governor Walsh very forcefully presented to the Legislature the situation which existed at that time, and I quote from his address to the General Court delivered on January 8, 1914: —

"Our railroad problems continue to be of the most engrossing and pressing importance. The loss to our investors resulting from a decade of lawlessness and mismanagement on the part of those who have, for their own ends, gained and kept control of the New York, New Haven & Hartford Railroad is nothing less than a public calamity. . . .

One critical problem — the present condition of the Boston & Maine Railroad — calls for present discussion. Prior to the New Haven domination of the Boston & Maine it had had an unbroken record of good dividend payments for more than seventy years. It had weathered successfully the storms of nearly three-quarters of a century, — more than half the life of the nation and of the Commonwealth, including the great Civil War, two foreign conflicts and many financial panics. Within ten years its capital stock has paid 7 per cent in dividends and sold above $190 per share. A confiding public then regarded its securities as sound and as safe as a government bond. Within three years it could borrow money at 4 per cent. Today it is paying no dividend, not even on its preferred stock. Its common stock now sells at about $40. It cannot without difficulty borrow money on any terms. Its stockholders are threatened with the loss of their entire investment. Its service is crippled for lack of money and credit. It is unable to do its part in our port development, for which nine millions of public money has been provided.

. . . . . .

The Cause. — This deplorable condition, menacing alike to investors and to the general public, is attributable to three main causes: —

First. — The system itself was built up in direct disregard of sound business principles; it is organically unsound. It is overweighted with fixed charges for rentals of the leased lines, some of them much inferior in value and earning capacity to that of the lessee company. These leases create obligations, equivalent, for most practical and business purposes, to debenture bonds. This leasing by one company of more than twenty other companies has thrown a risk and burden upon the stockholders of the leasing company which was for years not realized.

. . . . . .

Second. — Organically unsound, the revenues of this railroad have also been improperly, if not fraudulently, diminished by certain wasting and parasitic contracts, notably those made with the American Express Company and the Pullman Company, obtained from the Boston & Maine management under circumstances which suggest at least a legal fraud. Thus revenues that ought to have been collected and applied to the maintenance and improvement of the railroad properties and to the payments of dividends to its stockholders have been diverted for the benefit of these controlling or partially controlling interests.

Third. — To make a bad situation still worse, within the past three years, since the New Haven has taken open control of the Boston & Maine, it has accumulated a floating debt of some $27,000,000. This debt has mainly grown out of investments in the stocks of leased and affiliated companies, the purchase of which at the prices actually paid and with the financial resources that the managers of this road had at their command indicates recklessness and imprudence.

Nothing is clearer than that the present condition of the Boston & Maine Railroad is due to the form of its financial structure and to the incompetence and unfaithfulness of its past management.

The Remedy. — The control of the Boston & Maine by the New Haven is held by the national administration to be obnoxious to the Sherman act, and the Federal Department of Justice intends through the courts to enforce the wholesome provisions of that law, unless the necessity of court proceedings is avoided by the speedy voluntary separation of the two systems. This complete and immediate divorce demanded by the national government is equally demanded by the sound public policy of this Commonwealth.

There is now a settled and definite consensus of opinion in favor of the immediate and complete separation — in fact and not merely in form — of these two railroad systems; and, contemporaneously, for a thorough reorganization of the Boston & Maine system, which shall be just alike to the ratepaying public and to the holders of the securities involved. . . .

There is no spirit of confiscation in Massachusetts. The owners of the securities of public utility corporations may rely on being permitted to draw a full and fair return upon all capital honestly and prudently invested in the public service. But so long as our public utilities are privately owned, that private ownership must assume and bear the responsibility of management and also pay the penalty for mismanagement. The Commonwealth may and does regulate, both for the benefit of the ratepayer and to some degree for the benefit of the investor; but regulation is not management, and the main responsibility for the soundness of the invest-

ment rests and must continue to rest upon the management chosen by the stockholders.

Such reorganization as will reduce the proportion of fixed charges and put the railroad into the control of a management competent and faithful to the interest of its own stockholders or to the public is a condition precedent to legislative help and to public favor of any sort.

I repeat and emphasize: both nation and State insist upon an immediate divorce of the Boston & Maine from the New Haven and a contemporaneous reorganization of the Boston & Maine; that a larger part of the responsibility for that reorganization rests and must rest upon the owners of the stock of the leased lines; that if these owners should fail in the immediate, efficient performance of their duty, serious disaster to them and to the public at large is to be expected.

As the representative of the great public interest, I call upon all these owners to face *now* the real truth, to remember that they are, in a broad sense, trustees, not merely for themselves and for the stockholders, but for the whole Commonwealth.

While, as I have said, it is for the owners to devise a just and sound form of reorganization, it may be found expedient if not necessary to charter a new corporation in which the stock of the leased roads should be merged with those of the Boston & Maine, — the bonds of all the consolidating corporations being assumed by the new company, — so that the result shall be a railroad corporation organized substantially in accordance with the traditionally sound theories of Massachusetts railroad finance. The Commonwealth can and will aid in a wise plan of reorganization, with enabling legislation so framed as effectually to guard both our investors and our general public from a recurrence of the mismanagement and the evils of the past.

If those who ought to lead in the task of rehabilitating this railroad do not rise to their opportunity and duty the Commonwealth is not without recourse. The great middle classes which have suffered such losses in their savings from the mismanagement of the public service corporations by private interests, and have suffered such a loss in their earning power from the extortion of monopolies created by these same interests, are no longer blind to the pretensions of private ownership. They have seen so much vulgar graft where they once thought they saw only respectability, they have seen so much mediocrity and downright incompetence in places which pay princely salaries, that the glamor and pretence of it all is gone. . . .

Let me repeat, *there must be no delay.* Massachusetts cannot and will not see her industries crippled, her development checked, her investors robbed by a continuance of such railroad mismanagement as has marked the past few years. If the parties in interest avail themselves at once of the opportunity of reorganization on just and fair terms, any enabling legislation reasonably desired I shall gladly recommend; but if they fail in the prompt and efficient performance of that duty, it will then be the plain duty of the Commonwealth to take drastic and effective action to protect itself, its industries, its savings institutions and its citizens from further loss due to incompetent or unfaithful railroad management."

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Labor — Veterans' Preference — Contractors.

Under G. L. (Ter. Ed.), c. 149, § 26, where the force of laborers is to be reduced a veteran is to be given preference as to retention in the service.

April 27, 1933.

Hon. Edwin S. Smith, *Commissioner of Labor and Industries.*

Dear Sir: — You request my opinion upon the following question: —

"In reducing to a smaller group the number of mechanics, teamsters and laborers than previously needed on the project coming within the provisions of section 26, chapter 149 of the General Laws, is the contractor required to give preference to veterans who are qualified to do the work over other citizens of the Commonwealth by retaining the veterans on the job and discharging the citizen?"

Said G. L. (Ter. Ed.), c. 149, § 26, reads as follows: —

"In the employment of mechanics, teamsters and laborers in the construction, addition to and alteration of public works by the commonwealth, or by a county, town or district, or by persons contracting therewith for such construction, addition to and alteration of public works, preference shall first be given to citizens of the commonwealth who have served in the army or navy of the United States in time of war and have been honorably discharged therefrom or released from active duty therein, and who are qualified to perform the work to which the employment relates; and secondly, to citizens of the commonwealth generally, and, if they cannot be obtained in sufficient numbers, then to citizens of the United States, and every contract for such work shall contain a provision to this effect. The wages for a day's work paid to mechanics and teamsters employed in the construction, addition to or alteration of public works as aforesaid shall be not less than the customary and prevailing rate of wages for a day's work in the same trade or occupation in the locality where such public works are under construction or being added to or altered; provided, that no town in the construction, addition to or alteration of public works shall be required to give preference to veterans, not residents of such town, over citizens thereof. This section shall also apply to regular employees of the commonwealth or of a county, town or district when such employees are employed in the construction, addition to and alteration of public works for which special appropriations are provided. Any person or contractor who knowingly and wilfully violates this section shall be punished by a fine of not more than one hundred dollars."

In my opinion, the term "in the employment," as used in this section, refers to continuation in employment as well as to original employment. Accordingly, where the force employed is to be decreased, and the question arises whether a veteran or a nonveteran doing the same class of work is to be discharged, the veteran must be retained. See *Ransom* v. *Boston*, 192 Mass. 299.

You also request my opinion as to whether the provision in said section 26, to the effect that no town need give preference to nonresident veterans over citizens, applies to cities, and also whether the provision applies to contractors engaged upon public works of a town.

The word "towns," as here used, includes cities, just as it does when used in the first part of the section, G. L., c. 4, § 6, cl. 34th.

Also, in my opinion, the provision in question applies not only to cities and towns but to "persons contracting therewith for such construction." The proviso as to towns, appearing in the latter part of the section, was enacted at the same time with the provision for veterans' preference appearing in the first part of the section. Gen. St. 1919, c. 253. The two parts are to be read together. Although the words "or by persons contracting therewith for such construction," as used in the first part, are not repeated in the proviso, they are, in my opinion, applicable to it. This construction is in accord with what I think must have been the legislative intent.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Civil Service — Conviction.

Under G. L., c. 31, § 17, the word "conviction" applies to a case where a fine has been imposed after a plea of *nolo contendere,* and to a case where there has been a finding of guilty, imposition of a jail sentence, or a fine and a suspension of sentence or of payment.

MAY 1, 1933.

Hon. PAUL E. TIERNEY, *Commissioner of Civil Service.*

DEAR SIR: — You request my opinion as to whether the provision in G. L., c. 31, § 17, to the effect that no person shall be appointed or employed under civil service within one year after his "conviction" of any crime, is applicable (1) where a fine has been imposed after a plea of *nolo contendere,* (2) where there has been a finding of guilty, an imposition of a jail sentence, and a suspension of the sentence, and (3) where there has been a finding of guilty, an imposition of a fine, and a suspension of payment of the fine.

(1) A number of opinions have been rendered over a period of years to the effect that the word "conviction," as used in statutes not distinguishable in purport and effect from the statute here in question, applies to a case where a fine has been imposed after a plea of *nolo contendere.* II Op. Atty. Gen. 276; III *ibid.* 72; V *ibid.* 401; opinion to the Secretary of the Massachusetts Highway Commission, September 3, 1908 (not published). In *White* v. *Creamer,* 175 Mass. 567, the court says: "We do not doubt that a sentence imposed after a plea of *nolo contendere* amounts to a conviction in the case in which the plea is entered." See *Olszewaki* v. *Goldberg,* 223 Mass. 27. Accordingly, I answer your first question in the affirmative.

(2) and (3). I answer your second and third questions in the affirmative. There is none the less a conviction because the sentence is suspended. See *Mariano* v. *Judge of District Court,* 243 Mass. 90.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Labor — Veterans' Preference — Eight-Hour Law.

A town availing itself, under G. L. (Ter. Ed.), c. 117, § 2, of the services of men who are receiving support from it is not employing laborers within the meaning of G. L., c. 149. Therefore, as to such men, provisions as to veterans' preference and the eight-hour law do not apply.

May 4, 1933.

Hon. Edwin S. Smith, *Commissioner of Labor and Industries.*

Dear Sir: — You request my opinion as to the effect and bearing of sections 26 and 30 of G. L., c. 149, upon the use on public works of the services of persons supported through the departments of public welfare of cities and towns.

G. L. (Ter. Ed.), c. 117, § 2, is as follows: —

"The board of public welfare shall have the care and oversight of all such poor and indigent persons so long as they remain at the charge of their respective towns, and shall see that they are suitably relieved, supported and employed in the infirmary, or in such other manner as the town directs, or otherwise at the discretion of the board. Said board may remove to the infirmary children suffering destitution from extreme neglect of dissolute or intemperate parents or guardians, except as otherwise provided."

Section 26 of G. L., c. 149, provides that "in the employment of" laborers, as in the construction of public works, preference shall be given to veterans and citizens.

Section 30 of said chapter limits the service of laborers "employed by . . . towns" accepting this section to eight hours per day or forty-eight hours per week.

Certain towns, you inform me, are using upon the construction of public works the services of men who are receiving support from the welfare departments, and who are put to work under the provisions of G. L. (Ter. Ed.), c. 117, § 2, above cited. I assume that these men do not receive wages for their work, but receive merely the support from the welfare departments which they would be receiving if they were not working. I assume, also, that the making use of their services upon the particular piece of work in question is with the authority of the town.

Your questions are, as I understand them, (1) whether a veteran, for instance, who wishes to be hired as a laborer upon the work and paid wages therefor, is entitled under said section 26 to employment, notwithstanding the fact that there are men receiving support from the welfare department who can be put to work without wages under G. L. (Ter. Ed.), c. 117, § 2; and (2) whether the eight-hour law is applicable to the services of men put to work by the welfare department under said chapter 117.

In my opinion, these questions must be answered in the negative. A town availing itself, under G. L. (Ter. Ed.), c. 117, § 2, of the services of men who are receiving support from it is not employing laborers within the meaning contemplated by G. L., c. 149. This last chapter refers to labor for which wages are paid. Section 26 specifically provides that the wages of mechanics and teamsters shall not be less than the prevailing rate. This section, and also section 30, have, in my opinion, no reference

to, and in no way control or regulate, labor performed under G. L. (Ter. Ed.), c. 117, § 2.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Marriage — Conflict of Laws — Invalidity.

A marriage between uncle and niece, valid where performed, will be recognized in this State, where the parties to such marriage have not left the Commonwealth for the purpose of entering into it.

MAY 8, 1933.

His Excellency JOSEPH B. ELY, *Governor of the Commonwealth.*

SIR: — Your Excellency has asked my opinion as to the questions of law raised by a letter from the United States Secretary of State.

The letter raises the question as to whether persons occupying the relation to each other of uncle and niece, who have been married in Italy, could be prosecuted in Massachusetts for incest or other similar crime if they came here to reside; and whether, if they so came, their marriage would be recognized as valid in Massachusetts.

Although a marriage between two persons so related is prohibited by G. L., c. 207, §§ 1 and 2, and provision is made for the prosecution of the parties to such a marriage under G. L. (Ter. Ed.), c. 272, § 17, nevertheless, such marriages, in view of the fact that the validity of the marriage contract is recognized by our courts as governed by the law of the place where the marriage is contracted — subject only to the exceptions, — (1) marriages which are deemed contrary to the law of nature as generally recognized in Christian countries, and (2) marriages which the Legislature of the Commonwealth has declared shall not be allowed any validity because contrary to the policy of our own laws — are treated here as valid and the parties thereto are not liable to criminal prosecution. Within the second class of exceptions to the general rule noted there fall marriages made in a foreign jurisdiction contrary to our laws by a person residing and intending to continue to reside in this Commonwealth, for the purpose of avoiding the prohibitions of the marriage laws of the Commonwealth (G. L., c. 207, § 10).

A marriage between uncle and niece has not been treated in this Commonwealth as being contrary to the law of nature and so within the first exception noted. Indeed, such marriages were not void but only voidable under the law of England, at least prior to 1835.

Assuming that the law of the foreign country, where the marriage under consideration was contracted between parties actually therein, made valid such marriage, in spite of the stated relationship of the parties, such marriage will be recognized in this State and the parties will not be liable to prosecution for incest in this Commonwealth. *Sutton* v. *Warren*, 10 Met. 451; *Commonwealth* v. *Lane*, 113 Mass. 458; see *Commonwealth* v. *Ashey*, 248 Mass. 259.

The situation would be otherwise if the uncle, who had made his residence in Massachusetts with the purpose of continuing it here, "had proceeded abroad with the intention of marrying his niece and bringing her into the Commonwealth as his wife," as phrased in the letter of the Secretary of State, for, in such an event, the uncle, at least, would be liable to prosecution under said G. L., c. 207, § 10, and G. L. (Ter. Ed.),

c. 272, § 17, and the marriage would not be recognized as valid in Massachusetts. *Levy* v. *Downing*, 213 Mass. 334.

Of course, it goes without saying that if such a marriage is not valid under the laws of the foreign country in which it was performed neither is it valid in Massachusetts.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Insurance — Life Policy — Forms — Reinstatement.

Evidence of insurability under G. L. (Ter. Ed.), c. 175, § 132, par. 11, is limited to evidence of the condition of the person upon whose life the policy is written.

The words "holder of a policy" and "insured" are not synonymous.

MAY 18, 1933.

Hon. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — You have set forth certain facts and have asked my opinion with relation to the application to them of G. L. (Ter. Ed.), c. 175, § 132, as amended, as follows: —

"The Equitable Life Insurance Company of Iowa has filed a form of a policy of life insurance with the commissioner under said section 132, which contains the following provision:

'This policy, if not previously surrendered for cash, and if the extended term insurance has not expired, may be reinstated at any time within three years after the due date of any premium in default, upon furnishing evidence satisfactory to the Company of the insurability of the insured and, if the waiver of premium benefit is contained in the policy, of the insurability of the original beneficiary, together with the payment of all premium arrears with interest from the due date of unpaid premiums at six per cent per annum, and the payment or reinstatement of all indebtedness existing against the policy at the time of such default with accumulated interest at six per cent per annum.'

This form of policy insures the life of a minor person upon an application made by his father, who is the contracting party with the insurance company and who is described in the policy as the 'original beneficiary.' It further provides that in the case of the total and permanent disability of the original beneficiary, the company will waive the payment of further premiums on the policy."

G. L. (Ter. Ed.), c. 175, § 132, in its applicable parts, provides: —

"No policy of life or endowment insurance . . . shall be issued or delivered in the commonwealth until a copy of the form thereof has been on file for thirty days with the commissioner, . . . nor shall such policy, . . . be so issued or delivered unless it contains in substance the following: . . .

11. A provision that the holder of a policy shall be entitled to have the policy reinstated at any time within three years from the date of default, unless the cash surrender value has been duly paid or the extension period has expired, upon the production of evidence of insurability satisfactory to the company and the payment of all overdue premiums and any other indebtedness to the company upon said policy, with interest at the rate of not exceeding six per cent per annum or, at the option of the company, with interest as aforesaid compounded semi-annually."

Your specific questions are as follows: —

"1. Does the provision of said section 132 that the holder of a policy shall be entitled to have it reinstated upon the production of evidence of insurability satisfactory to the company refer to the person whose life is insured, or, is a beneficiary named in the policy who makes the contract with the company and with whom there also is a contract of insurance embodied in the policy, also a 'holder' within the meaning of said provision?

2. May the commissioner of insurance under said section 132 lawfully approve a form of life policy that is payable to a beneficiary who makes the contract on behalf of the insured with the company, and providing that upon the disability of the beneficiary certain benefits shall accrue to the insured, if it provides that it may be reinstated upon evidence of insurability of the person insured and of such beneficiary satisfactory to the company?"

(1) The words "holder of a policy" and "insured" are not synonymous. By holder of a policy is meant the person who enters into the contract with the company, becoming liable for the premiums. In the case of a person who insures the life of another for his own benefit, as does the maker of the policy to which you have referred, such person is the "holder of the policy" as such phrase is used in said G. L. (Ter. Ed.), c. 175, § 132, par. 11.

(2) It has been held in prior opinions of the Attorney General (VIII Op. Atty. Gen. 482; Attorney General's Report, 1931, p. 124) that the word "insured," as used in G. L., c. 175, § 24, and in section 123, is limited in meaning to the person upon whose life the policy is written and does not include a beneficiary of such a policy, even though such beneficiary has a subsidiary contract of insurance with relation to himself embodied in the policy. It follows that the phrase "evidence of insurability," as used in G. L. (Ter. Ed.), c. 175, § 132, par. 11, is limited to evidence of the condition of the person upon whose life the policy is written, and does not embrace that of a beneficiary. I therefore answer your second question in the negative.

If the writing of policies such as you have described is a desirable form of insurance, the Legislature might by appropriate and unequivocal language provide that beneficiaries of the sort to which you have referred should supply evidence of insurability before reinstatement of policies, but such a requirement cannot be read into the law in the absence of an expression of legislative intent in this regard.

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

State Treasurer — Deposits — Stockholder's Liability.

The State Treasurer may assent to a plan for reorganization of a trust company in which the Commonwealth is a depositor.

Where the Commonwealth is trustee of a fund containing bank stock liable to assessment it would appear equitable that a proper proportion of the assessment should be paid.

MAY 18, 1933.

HON. CHARLES F. HURLEY, *Treasurer and Receiver General.*

DEAR SIR: — You state that the Commonwealth has a deposit in the Worcester Bank and Trust Company, which is now closed, and you

request my opinion as to whether you have authority to assent to a plan of reorganization under which the Commonwealth will receive an unrestricted checking account, in a national bank to be organized, of forty per cent of the deposit and a certificate for the balance, entitling it to dividends resulting from the sale of stock in the national bank and from the sale of the trust company's assets, as is specifically set forth in a prospectus of the proposed plan of reorganization.

G. L. (Ter. Ed.), c. 29, § 34, provides: —

"The state treasurer may deposit any portion of the public moneys in his possession in such national banks, or trust companies, lawfully doing business in the commonwealth, as shall be approved at least once in three months by the governor and council; . . ."

In my opinion, if you consider it for the best interests of the Commonwealth as a depositor that it assent to the plan of reorganization, you should, in view of the provisions of G. L., c. 29, § 34, ask for the approval of the Governor and Council, and, upon obtaining such approval, you may assent to the plan.

You also request my opinion as to your authority to compromise an assessment of stockholder's liability. You state that 20 shares of stock in the Worcester Bank and Trust Company stand in the name of the Treasurer and Receiver General, in trust for the Lyman and Industrial Schools, and that the Commissioner of Banks has demanded of you the payment of $400, or the par value of said 20 shares, as a stockholder's liability necessary to pay the debts of the trust company. The proposed plan of reorganization, approved by the Commissioner of Banks, provides an opportunity for stockholders to compromise, subject to qualifications therein stated, their liability by a payment of seventy-five per cent of the assessment.

This stock is held by you in the Lyman fund, so called, under the provisions of G. L. (Ter. Ed.), c. 10, § 15, which reads as follows: —

"The state treasurer may receive from the trustees of Massachusetts training schools the principal of the various trust funds conveyed or bequeathed to the said trustees for the use of any institution of which they are trustees; and upon the request of said trustees he shall pay out the income of all such funds, and such part of the principal as may be subject to the control of said trustees, in such manner as the trustees may direct, subject to any condition affecting the administration thereof. The state treasurer may also receive from said trustees the unclaimed money paid over under section twenty-three A of chapter one hundred and twenty which shall be held by him as two separate funds, one to consist of money belonging to former male wards of said trustees the income of which shall be expended as directed by the said trustees for the purpose of securing special training or education for or otherwise aiding and assisting their meritorious male wards, and the other to consist of money belonging to former female wards of said trustees the income of which shall be expended for their female wards in the same manner and for the same purposes as above provided for their male wards. Upon certificate of the comptroller that a claim thereto satisfactory to him shall have been established and approved in writing by the attorney general, the state treasurer shall pay to any former ward, or to his legal representatives in case of his death, the amount of money held for his benefit and paid over to the state treasurer under said section twenty-three A without any accumulations accruing thereto after such payment over,

out of the principal of the fund in which the money so claimed was held as aforesaid. The said funds, if in cash, shall be invested safely by the state treasurer, or, if in securities, he may hold them in their original form or, upon the approval of the governor and council, sell them and reinvest the proceeds in securities which are legal investments for the commonwealth sinking funds. He shall be held responsible for the faithful management of said trust funds in the same manner as for other funds held by him in his official capacity."

G. L. (Ter. Ed.), c. 120, § 1, reads as follows: —

"The trustees of the Massachusetts training schools, in this chapter called the trustees, shall be a corporation for the purpose of taking, holding and investing in trust for the commonwealth, subject to section fifteen of chapter ten, any grant or devise of land or any gift or bequest made at any time for the use of any institution of which they are trustees and they shall succeed to and retain the rights, powers and duties formerly held or acquired by the board of trustees and treasurers of the state reform and state industrial or state primary schools except as provided in said section."

There may be some question as to the assessability of this stock so held, but it seems at any rate equitable that the Commonwealth should assume its share of the liability which it has imposed upon stockholders in its trust companies. The amount involved is not large. In my opinion, you should seek the approval of the trustees, and, having obtained it, compromise the claim as proposed by paying $300 from cash in the Lyman fund.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Citizenship — Registration of Voters — Certificate.

A certificate of derivative citizenship is of the same effect as "papers of naturalization" referred to in G. L. (Ter. Ed.), c. 51, § 45.

MAY 24, 1933.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — You have set forth the provisions of G. L. (Ter. Ed.), c. 51, § 45, relative to applications for registration as voters of naturalized citizens, and of the Federal laws (45 U. S. Stat. at L., 1515), concerning persons who claim to have derived United States citizenship through the naturalization of a parent. With relation thereto you have asked my opinion in the following language: —

"Will you kindly inform me whether, in your opinion, a certificate of derivative citizenship is sufficient for production as papers of naturalization or whether it is necessary to amend our present law to permit same."

I am of the opinion that a certificate of derivative citizenship issued under the applicable provisions of the Federal laws above referred to, which is declared by such laws to "have the same effect as a certificate of citizenship issued by a court having naturalization jurisdiction," falls within the meaning of "papers of naturalization" as those words are used in said G. L. (Ter. Ed.), c. 51, § 45.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Citizens Domiciled — Marital Status.

May 29, 1933.

Hon. Edwin S. Smith, *Commissioner of Labor and Industries.*

Dear Sir: — You request my opinion "on what steps are necessary for a person coming from another State to qualify as a citizen of the Commonwealth in order to take advantage of the preference requirements accorded citizens on public works, as set forth in G. L., c. 149, § 26."

You also request my opinion as to whether "a married man and an unmarried man, citizens of the United States, coming from outside the State, go through different procedures to qualify as citizens of Massachusetts."

G. L., c. 1, § 1, provides: —

"All persons who are citizens of the United States and who are domiciled in this commonwealth are citizens thereof."

"Domiciled in this commonwealth" means to have their home in this Commonwealth. A man can be domiciled only in one place. Whether a man living in Massachusetts is domiciled here depends upon whether he has in fact in his mind the decision of making his home here. This is a question of fact which it is often very difficult to ascertain. The fact that he lives here is not enough to make him a citizen. Nor is the fact that he says his home is here conclusive. Other facts may indicate that his home is really elsewhere. On the other hand, it is not necessary that he live here any length of time in order to become domiciled here, and so a citizen, provided he has in truth decided that his home is here.

As to your second question, there is no difference in the procedure of becoming a citizen, whether a man is married or unmarried. However, his status in this respect, and particularly the question of whether his family, if he have one, is living here or elsewhere, has a bearing, together with other things, upon the question of his actual intent.

Very truly yours,
Joseph E. Warner, *Attorney General.*

Sunday Laws — Games — Amusements — Licenses.

June 7, 1933.

Gen. Daniel Needham, *Commissioner of Public Safety.*

Dear Sir: — You request my opinion as to whether licenses to maintain certain enterprises or amusement parks on Sunday, granted by a mayor or selectmen under the provisions of section 4A of G. L., c. 136, are required to be submitted to the Commissioner of Public Safety for approval, as are licenses granted under section 4 of said chapter.

Section 4 reads as follows: —

"Except as provided in section one hundred and five of chapter one hundred and forty-nine, the mayor of a city or the selectmen of a town may, upon written application describing the proposed entertainment, grant, upon such terms or conditions as they may prescribe, a license to hold on the Lord's day a public entertainment, in keeping with the character of the day and not inconsistent with its due observance, to which admission is to be obtained upon payment of money or other valuable consideration; provided, that no such license shall be granted to have

effect before one o'clock in the afternoon, nor shall it have effect unless the proposed entertainment shall, upon application accompanied by a fee of two dollars, have been approved in writing by the commissioner of public safety as being in keeping with the character of the day and not inconsistent with its due observance. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving the hearing."

Section 4A was added by St. 1933, c. 150. It reads as follows: —

"The mayor of a city or the selectmen of a town, upon written application therefor, and upon such terms and conditions as they may prescribe, may grant licenses for the maintenance and operation upon the Lord's day at amusement parks or beach resorts, so called, in such city or town, of any enterprise hereinafter described, for admission to which or for the use of which a payment of money or other valuable consideration may or may not be charged, namely: — Bowling alleys; shooting galleries restricted to the firing therein of rifles, revolvers or pistols using cartridges not larger than twenty-two calibre; photographic galleries or studios in which pictures are made and sold; games approved by the state department of public safety; and such amusement rides, so called, riding devices or other amusement devices as may lawfully be operated therein on secular days. Any licensee hereunder may distribute premiums or prizes in connection with any game or device lawfully maintained and operated by him under authority hereof."

The phrase "approved by the state department of public safety" as used in section 4A must be construed, in my opinion, as applicable only to the "games" referred to in said section, and as inapplicable to the other forms of amusement specifically enumerated, namely, bowling alleys, shooting galleries, photographic galleries and amusement rides. The provision as to games is separated by semicolons from the provisions referring to the other forms of amusement enumerated, and is placed, moreover, neither at the beginning nor at the end but in the midst of the list enumerated. As the statute is drawn, it must, in my opinion, be construed as permitting the licensing of bowling alleys, shooting galleries, photographic galleries and amusement rides independently of any determination that such amusements are in keeping with the character of the day. No such condition is expressed, and I do not see how it can be implied. As to "games," the approval of "the state department of public safety" is expressly required. This, in my opinion, is to be construed as meaning such approval as is provided for in section 4 for the licensing of public entertainments, namely, approval of the game by the Commissioner, in writing, as in keeping with the character of the day, upon application accompanied by a fee of two dollars.

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Fish and Game — Director — Open Season.

The Director of the Division of Fisheries and Game is not authorized to declare an open season on pheasants for any territory less than a county nor with relation to certain classes of citizens.

June 15, 1933.

Hon. Samuel A. York, *Commissioner of Conservation.*

Dear Sir: — In a recent communication you have set forth the text of G. L. (Ter. Ed.), c. 131, § 90, which is as follows:—

"The director may declare an open season on pheasants in any county where such open season seems advisable, and may make such rules and regulations relating to bag limit, time and length of open season and varieties to be taken, and all other matters connected with such open season as he may deem necessary or expedient."

and in relation thereto have asked my opinion as follows: —

"I would respectfully request your opinion as to whether or not the Director of the Division of Fisheries and Game in his discretion is authorized by said section 90 to promulgate regulations which might grant different hunting seasons or increased bag limits to those landowners who do liberate artificially propagated pheasants at their own expense on private lands."

Said chapter 131, § 90, which is the applicable statute, does not authorize the Director of the Division of Fisheries and Game to declare an open season on pheasants for any territory less than that embraced in a county nor to create open seasons of varying length for particular classes of citizens. Nor does the power to make rules and regulations given such Director by said section 90 authorize him to establish rules and regulations which shall give to a certain class of citizens alone, whether landowners or others, special privileges as to bag limits or other matters in connection with the hunting of pheasants.

The Legislature has not indicated any intent to create special privileges in this respect for the benefit of landowners who "liberate artificially propagated pheasants," nor has it delegated power to the said Director, under the guise of rule making authority, to create classifications of this nature of citizens who are not to be subject to rules and regulations binding on others relative to hunting pheasants.

If it is desired to secure for landowners who liberate on private land pheasants artificially propagated, special privileges in hunting such birds, resort should be had to the General Court.

Very truly yours,
Joseph E. Warner, *Attorney General.*

State Forests — County Commissioners — Approval of Plans.

It is not necessary to obtain the approval by county commissioners for the construction or alteration of a dam by the Department of Conservation in a State forest.

July 3, 1933.

Hon. Samuel A. York, *Commissioner of Conservation.*

Dear Sir: — You have requested my opinion as to whether or not it is necessary for the department to procure approval of plans by county

commissioners for a dam to be constructed in a State forest under the jurisdiction of your department.

The provisions of law relating to State forests are contained in G. L. (Ter. Ed.), c. 132, § 31, which reads as follows: —

"Section 31. Lands acquired under section thirty or thirty-three shall be known as state forests, and shall be under the control and management of the forester. Lands acquired by purchase for experiment and illustration in forest management and for reforestation under the provisions of chapter four hundred and seventy-eight of the acts of nineteen hundred and eight and amendments thereof, or of the corresponding provisions of later laws, as to which the period limited for repurchase by their original owners, or their heirs or assigns, in accordance with said provisions shall have expired without such repurchase, shall also be known as state forests and shall be under the control and management of the forester to the same extent as if acquired under section thirty. He shall reforest and develop such lands, and may, subject to the approval of the commissioner and advisory council of the department of conservation, make all reasonable regulations which in his opinion will tend to increase the public enjoyment and benefit therefrom and to protect and conserve the water supplies of the commonwealth."

The provisions relative to the approval of plans for the construction or alteration of a dam are contained in G. L. (Ter. Ed.), c. 253, § 44, which reads as follows: —

"Section 44. A reservoir, reservoir dam or mill dam shall not be constructed or materially altered until plans and specifications of the proposed work have been filed with and approved by the county commissioners of the county where it is situated. Said commissioners shall retain and record such plans and specifications and shall inspect the work during its progress; and if at any time it appears that the plans and specifications are not faithfully adhered to, they may appoint an inspector to be constantly engaged at the expense of the owners in the supervision of the work. Upon a refusal of the owners or of their agents to adhere to said plans and specifications, said inspector may order the discontinuance of the work. This and the six following sections shall not apply to small dams, constructed for irrigation or for other purposes, the breaking of which would involve no risk to life or property, nor to standpipes or tanks, nor to a dam where the area draining into the pond formed thereby does not exceed one square mile, unless the dam is more than ten feet in height above the natural bed of the stream at any point or unless the quantity of water which the dam impounds exceeds one million gallons."

The Legislature has entrusted the management of State forests to the State Forester, subject to such control as is exercised by the Commissioner and Advisory Council of the Department of Conservation. In carrying out construction on the property of the Commonwealth in State forests the officials of the Department of Conservation act as agents of the Commonwealth, and are exercising dominion over property of the Commonwealth. The general law made for the regulation of citizens in regard to the construction and alteration of dams must, under general principles of statutory interpretation, be held to be subordinate to the special statute placing in officials of the Department of Conservation complete jurisdiction over the management of State forests. No provision

to the contrary is to be found in the applicable statute. It is not to be assumed that in the absence of such a special provision the Legislature intended to give to local officials vested with a certain power of approval, somewhat similar in effect to a licensing power, authority to control or interfere with the reasonably necessary efforts of the officials of the Department of Conservation to perform their duties as agents of the Commonwealth. See *Teasdale* v. *Newell & Snowling Construction Co.*, 192 Mass. 440, 443; I Op. Atty. Gen. 290; II *ibid.* 56 and 399; V *ibid.* 49 and 109; opinion to the Commissioner of Correction, dated January 20, 1933 (*ante*, p. 38).

In my opinion, therefore, it is not necessary for the officials of the Department of Conservation to procure any approval of plans for the construction or alteration of a dam on property of the Commonwealth included in a State forest.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Constitutional Law — Statutes — Time of Taking Effect.

JULY 13, 1933.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — In a recent letter you have written me as follows: —

"Chapter 307 of the Acts of 1933 was passed to be enacted June 29, 1933. I understand it was forwarded to the Governor at Westfield. On the bill appears the approval by the Governor on July 1, 1933. The bill was received in the office of the Secretary of the Commonwealth on July 7, 1933. I am informed by one of the secretaries to the Governor that the Governor approved it on July 1st and that it was placed in storage in a vault for safe-keeping until its return to me.

Will you kindly advise me whether this act became effective July 1, 1933, by approval of the Governor or July 7, 1933, by operation of law."

The answer to your question is governed by the terms of Mass. Const., pt. 2d, c. I, § 1, art. II, the applicable parts of which read: —

"No bill or resolve of the senate or house of representatives shall become a law, and have force as such, until it shall have been laid before the governor for his revisal; and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill or resolve, he shall return the same, together with his objections thereto, in writing, to the senate or house of representatives, in whichsoever the same shall have originated; who shall enter the objections sent down by the governor, at large, on their records, and proceed to reconsider the said bill or resolve. . . .

And in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the governor within five days after it shall have been presented, the same shall have the force of a law."

The bill to which you refer became law and effective as of the date of its approval by the Governor, under the facts as you have set them forth. The intent of the framers of the Constitution in this regard was to provide that a bill passed by the two houses of the Legislature should become a law when signed by the Governor unless he returned the same to the Legislature unapproved. The second paragraph of said article II was

intended to apply to bills as to which the Governor had not signified his approbation by signing within five days of presentation. *Seven Hickory* v. *Ellery*, 103 U. S. 423.

Yours very truly,
JOSEPH E. WARNER, *Attorney General.*

Retirement System — Computation of Pension — Employment.

An employee of the Commonwealth is not to be entitled to be credited with the time spent prior to present employment as an assessor for a city.

JULY 19, 1933.

Hon. CHARLES F. HURLEY, *Chairman, State Board of Retirement.*

DEAR SIR: — You have asked me in effect as to whether, in computing the pension of an employee of the Commonwealth about to be retired at the age of seventy, he should be credited with time spent, prior to appointment to his present position, as an assessor of taxes for a city.

My answer is in the negative. An assessor of taxes for a city is a public officer of a municipality; he is not "in the direct service of the Commonwealth" so as to be an "employee" of the Commonwealth, as the quoted words are used in the Retirement Act [G. L. (Ter. Ed.), c. 32]. That such an assessor is a public officer of a municipality is made plain by the opinion of the Supreme Judicial Court in *Walker* v. *Cook*, 129 Mass. 577, and *Welch* v. *Emerson*, 206 Mass. 129. It was pointed out by the court in the former opinion that an assessor was not a "servant" of a municipality, but it does not follow from that fact that he is a servant of the Commonwealth or in its service, as the word "service" is used in the Retirement Act. The court in said opinion points out specifically that it is distinguishing between those who are agents or servants of a municipality and those who are public officers.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Intoxicating Liquors — Licenses — Termination.

JULY 24, 1933.

Hon. WILLIAM E. HAYES, *Chairman, Alcoholic Beverages Control Commission.*

DEAR SIR: — You state that the town of Shelburne at the special election of June 13th of this year voted "No" upon the question "Shall licenses be granted in this city (or town) for the sale therein of wines and malt beverages?" (St. 1933, c. 120, § 18); that prior to that date certain licenses had been issued (under the provision of section 19 of said chapter), such licenses purporting to be for the term of one year, and that license fees had been paid therefor. You request my opinion as to whether the right of such licensees to sell terminated with the vote of the town of June 13th, or whether such right continues for the term stated in the licenses.

Section 18 of the statute reads as follows: —

"The state secretary shall cause to be placed on the official ballot used in the cities and towns at each biennial state election the following ques-

tion: — 'Shall licenses be granted in this city (or town) for the sale therein of wines and malt beverages?'

If a majority of the votes cast in a city or town in answer to the question are in the affirmative, such city or town shall be taken to have authorized, for the two calendar years next succeeding, the sale in such city or town, of wines and malt beverages, subject to the provisions of federal law and of this act."

Section 19 provides, in part, that: —

"Prior to January first, nineteen hundred and thirty-five, and pending the taking, in any manner authorized under this act, of the vote in any city or town on the question of granting licenses for the sale therein of wines and malt beverages, the granting of such licenses and the sale of wines and malt beverages under this act shall be authorized therein upon the filing with the city or town clerk of an order to that effect by the mayor of such city or the selectmen of such town, but not otherwise. . . ."

It further provides for the taking of a vote in a special election if held prior to the next biennial State election; and that —

"Any vote on such question taken under this section shall have the same legal effect, for the period ending on December thirty-first, nineteen hundred and thirty-four, as a vote at a biennial state election under section eighteen."

Section 13 provides, in part, that —

"All licenses and permits, unless otherwise in this act provided, shall be for the term of one year from their respective dates of issue, subject, however, to cancellation or revocation within such term; . . ."

Although the statute makes no express provision for the issuance of licenses for the indefinite term pending the taking of a vote under section 19, or for the payment of a special fee for such an indefinite license, yet, in my opinion, it is the intent of section 19 that the licenses authorized thereunder shall expire upon the taking of a negative vote by a town.

In my opinion, the licensees in question took their licenses subject to such a provision, and they are not now authorized to make sales thereunder.

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

Department of Public Health — Appeal — Refusal of License.

JULY 25, 1933.

Dr. GEORGE H. BIGELOW, *Commissioner of Public Health.*

DEAR SIR: — You request my opinion as to whether upon an appeal to the Department of Public Health under section 41 of G. L. (Ter. Ed.), c. 94, the department should pass upon the reasonableness and validity of a regulation passed by a board of health of such town in a case where a license has been refused because of the existence of such regulation.

Said section 41 is as follows: —

"An inspector of milk in any town, for the purposes mentioned in the preceding section and subject to the regulations established by the board of health of such town, may grant licenses to suitable persons, and shall receive for each license so granted a fee of fifty cents for the use of such town, and all license fees collected by him shall be paid over monthly to

the town treasurer. Such licenses shall remain in force until June first following, unless previously suspended or revoked. An inspector of milk may declare any license granted by him suspended or forfeited upon a conviction of the licensee in any court of the commonwealth for violation of his license. If the applicant for a license fails to comply with any regulation of the board of health of the town where the application is made, a license may be refused until he has complied with such regulation; and a license granted under this section may be revoked at any time for failure to comply with any such regulation. If a license is so refused or revoked, an appeal may be taken to the department of public health, whose decision shall be final. Every inspector of milk shall annually during the month of June, and at any other time upon special request of the commissioner of agriculture, furnish to him a list of dealers holding licenses for the sale of milk, skimmed milk or cream who purchase the same directly from producers in the commonwealth. If any inspector revokes such a license or reinstates such a license previously revoked, he shall, within ten days after the effective date of such revocation or reinstatement, notify said commissioner in writing to that effect."

A refusal of the license is wrongful if based solely upon an invalid regulation; and, in my opinion, under the statute in question it is the duty of the Department of Public Health, on appeal, to pass upon the validity of a regulation if that question is put in issue.

Yours very truly,

JOSEPH E. WARNER, *Attorney General.*

Veterans' Preference — Division of Smoke Inspection — Additional Service.

AUG. 22, 1933.

Hon. HENRY C. ATTWILL, *Chairman, Department of Public Utilities,* and Hon. PAUL E. TIERNEY, *Commissioner of Civil Service.*

GENTLEMEN: — You jointly request my opinion as to whether three disabled veterans who were appointed inspectors in the Division of Smoke Inspection subsequent to the enactment of St. 1930, c. 380, are entitled to be retained in preference to three other inspectors who had been employed in the smoke inspection work of the department prior to the enactment of said chapter.

By St. 1930, c. 380, a Division of Smoke Inspection in the department was created to enforce the provisions of St. 1910, c. 651, relative to smoke abatement, which were previously enforced by the department, and also to perform certain additional duties in relation to the issuance of permits, as provided by St. 1930, c. 412. Under said chapter 380 the Commission, in addition to those already employed by it in the work of smoke inspection, employed certain inspectors to serve in the Division of Smoke Inspection, as the Commission was authorized to do under said chapter. By chapter 76 of the acts of the present year the Division of Smoke Inspection was abolished; chapter 412 of the Acts of 1930, imposing upon the division certain duties in addition to the enforcement of the act of 1910, was repealed; and it was provided that all functions relative to smoke abatement shall be performed by the Commission. In view of the fact that the duties of the department under said chapter 76 are less than were the duties of the division under chapters 380 and 412 of the Acts of 1930 and that the appropriation for smoke abatement made this year

(item 618a of chapter 174) is insufficient to pay all the employees previously serving in the Division of Smoke Inspection, the smoke abatement work of the department under said chapter 76 must be performed with a smaller force than that previously serving in the division; and, accordingly, the department has notified certain of the employees that their services are no longer required. Among those so notified are three disabled veterans, employed by the Commission since the enactment of chapter 380 of the Acts of 1930, who contend that they are entitled to be retained in employment by virtue of the provisions of G. L., c. 31, § 23, which provides that "A disabled veteran shall be appointed and employed in preference to all other persons, including veterans."

In an opinion rendered March 29, 1930, to the Commissioner of Civil Service (Attorney General's Report, 1930, p. 69) I ruled that the above quoted provision of section 23 applied to continuation in employment as well as to original selection. Accordingly, it is my opinion that the three disabled veterans to whom you refer are entitled to be retained in preference to others engaged in the same class of work.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Labor — Hours of Work — Authority of Commissioner of Labor and Industries.

AUG. 24, 1933.

Hon. EDWIN S. SMITH, *Commissioner of Labor and Industries.*

DEAR SIR: — You state that the Metropolitan District Water Supply Commission, having awarded a certain construction contract under St. 1926, c. 375, requested the Commissioner of Labor and Industries that the contractor be allowed to employ labor for more than eight hours a day and more than forty-eight hours a week, this request being made in accordance with section 2 of said chapter, which provides, in part, that —

"In contracts entered into by the commission for the construction of the works herein authorized, there may be inserted a provision that the commission or any contractor or sub-contractor for the commission may employ laborers, workmen and mechanics for more than eight hours in any one day and for more than forty-eight hours in any one week in such construction, when, in the opinion of the commissioner of labor and industries, public necessity so requires . . ."

You also state that in answer to said request the then Acting Commissioner of Labor and Industries wrote the Metropolitan District Water Supply Commission that —

"It is my opinion as Acting Commissioner of Labor and Industries that public necessity requires that such construction be carried forward as rapidly as possible and in compliance with chapter 375 of the Acts of 1926 and of chapter 321 of the Acts of 1927, I hereby approve the employment of laborers, workmen and mechanics for more than eight hours a day and more than forty-eight hours in any one week on such construction."

The contract in question contains the following provision: —

"No laborer, workman or mechanic working within this Commonwealth in the employ of the Contractor, subcontractor or other person

doing or contracting to do the whole or a part of the work contemplated by the contract shall be required or permitted to work more than eight hours in any one day or more than forty-eight hours in any one week, except in cases of extraordinary emergency. However, the Commission or the Contractor or any subcontractor contracting to do the whole or a part of the work contemplated by the contract may employ laborers, workmen and mechanics for more than eight hours in any one day and for more than forty-eight hours in any one week when, in the opinion of the commissioner of labor and industries, public necessity so requires."

You request my opinion as to whether it is "within the power of the Commissioner of Labor and Industries to revoke the permission given this concern, if it appears to him that a 'public necessity' no longer exists requiring operation by this concern more than eight hours a day and forty-eight hours in the week."

In my opinion, under the statutory provision above quoted the question of public necessity remains open at all times during the performance of the contract, and if the Commissioner is of the opinion at any time that no public necessity exists he has authority to terminate the permission previously given.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Registrar of Motor Vehicles — Suspension of License — Bankruptcy.

Discharge in bankruptcy is not of itself sufficient to require the Registrar to restore a license suspended under the provisions of G. L., c. 90, § 22A.

AUG. 25, 1933.

HON. FRANK E. LYMAN, *Commissioner of Public Works.*

DEAR SIR: — You request my opinion as to whether under St. 1932, c. 304 (G. L., c. 90, § 22A), the Registrar of Motor Vehicles, who has in accordance with said section suspended a license to operate because the licensee has failed to satisfy in full a judgment against him in an action for property damage, is authorized to terminate such suspension or renew the license upon a discharge in bankruptcy obtained by such licensee. Said section provides that a suspension of a license thereunder shall not be terminated or the license renewed until the Registrar is satisfied that "said judgment has been fully satisfied or the judgment creditor has released or discharged the judgment debt."

It cannot be said in this case that "the judgment creditor has released or discharged the judgment debt." The only question is whether through a discharge in bankruptcy a "judgment has been fully satisfied" within the meaning of these words as used in this statute. In my opinion, the judgment is not "fully satisfied" within the words of this statute by a discharge in bankruptcy. To rule otherwise would, I think, involve giving these words an unusual meaning. If suit were brought upon the judgment, plea in defence would be discharge in bankruptcy, not judgment satisfied. Also it is to be noted that the words "fully satisfied" are used in alternative clauses in the statute with the words "released or discharged," and thus apparently are differentiated. Moreover, to rule otherwise would, I think, be contrary to the spirit and intent of the statute.

An operator who is willing but unable to pay a judgment cannot have his license restored. Bankruptcy proceedings should not change the result.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

State Forests — Timber Production — Recreation.

AUG. 29, 1933.

Hon. SAMUEL A. YORK, *Commissioner of Conservation.*

DEAR SIR: — You request my opinion as to whether certain portions of the lands required for State forests under St. 1914, c. 720, St. 1920, c. 606, and G. L., c. 132, §§ 30 and 33, may be administered for "recreation rather than strictly for timber production" or whether new legislation is necessary to authorize such procedure.

In my opinion, legislation is necessary. The statutes under which the lands were acquired provide that they shall be used for forest cultivation, and contain no authority to use them for another purpose.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Marriage — Prohibition — Adopted Son.

SEPT. 13, 1933.

Hon. FREDERIC W. COOK, *Secretary of the Commonwealth.*

DEAR SIR: — You have written me as follows: —

"Will you kindly give me your opinion as to whether, under the statutes, an adopted son is prohibited from marrying the daughter of his adoptive father when no degree of consanguinity exists."

I am of the opinion that there is no prohibition under our statutes of a marriage such as you describe.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Division of Child Guardianship — Consent to Schick Test.

SEPT. 25, 1933.

Hon. RICHARD K. CONANT, *Commissioner of Public Welfare.*

DEAR SIR: — You have requested my opinion as to whether the Division of Child Guardianship can legally give consent for a Schick test and the toxin-antitoxin treatments for diphtheria to be given to minors, under its charge for various causes.

In any instance where the "*custody*" of a minor has been properly vested in your department or in said division by a court of competent jurisdiction, your department or said division, if so authorized by the Commissioner, may properly, under justifying circumstances, give consent for such a test or treatments as you have mentioned for such a minor, and such consent should be sufficient for the purposes of the State Department of Public Health.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Town — Assumption of Liability — Public Work.

Oct. 9, 1933.

Hon. Frank E. Lyman, *Commissioner of Public Works.*

Dear Sir: — I am in receipt from you of the following communication: —

"The Department of Public Works encloses copies of a vote passed by the Town of Hull at a meeting held September 21, 1933, accepting the provisions of chapter 330 of the Acts of 1933, and a letter from the town counsel under date of October 4, and of an agreement executed by the selectmen to indemnify the Commonwealth against damages which may be caused by the work authorized by the statute. A copy of the statute is also enclosed.

In similar cases, it has been the custom of the department to require a special vote at the town meeting assuming liability for damages and authorizing the selectmen to execute an indemnity bond. The Commissioners will much appreciate the receipt of an opinion from you as to whether the vote of the Town of Hull on September 21, covers the requirements of the statute and is sufficient authorization for the bond of indemnity executed by the selectmen."

St. 1933, c. 330, in its applicable part, provides: —

"Section 1. Subject to the conditions herein imposed, the department of public works is hereby authorized and directed to place riprap for the purpose of protecting the shore at Stony Beach in the town of Hull from erosion by the sea. No work shall be begun until the town of Hull has assumed liability, in the manner provided by section twenty-nine of chapter ninety-one of the General Laws, for all damages that may be incurred hereunder, . . ."

The vote taken by the town of Hull, a copy of which you have transmitted to me, accepted the provisions of said chapter 330 and appropriated the sum of $4,000 for such work, as required by other provisions of the said chapter 330, which I have not quoted. Said vote did not contain any words expressing any assumption of liability.

G. L. (Ter. Ed.), c. 91, § 29, referred to in said chapter 330, reads as follows: —

"A town may appropriate money for the improvement of rivers, harbors, tide waters and foreshores within its jurisdiction, and the money so appropriated shall be paid to the state treasurer and be expended by the department for said purposes within the limits of such town; and the town may also assume liability for all damages to property suffered by any person by any taking of land, or of any right, interest or easement therein, within the town made by said department for the purposes hereinbefore authorized."

The vote passed by the town as aforesaid does not indicate that the town of Hull "has assumed liability, in the manner provided by section twenty-nine of chapter ninety-one of the General Laws, for all damages that may be incurred," as provided as a condition precedent to the beginning of work by the Department of Public Works under the terms of chapter 330. An acceptance of said chapter 330 and an appropriation of money for its purposes do not necessarily include an assumption of liability for damages that may be incurred in pursuing the work pro-

vided for by said chapter. A specific assumption of liability in a vote of the town is contemplated by the wording of chapter 330, and such assumption has not yet, under the facts as you have set them forth, been made by the town. In the absence of such a vote there is no sufficient authorization from the town for the bond of indemnity executed by the selectmen, to which you refer in your communication.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Trustees — Funds — School.

The board of trustees of a textile school may not delegate its powers to a bank.

OCT. 9, 1933.

Hon. FRANCIS X. HURLEY, *Auditor of the Commonwealth.*

DEAR SIR: — You have written me as follows: —

"In connection with the work of this office, an audit is being made of the accounts of the Bradford Durfee Textile School in Fall River, and during the progress of this work it was found that the trustees of this school have delegated certain of their powers in connection with trust funds, endowments, etc., to the B. M. C. Durfee Trust Company of Fall River.

A copy of the agreement between the board of trustees and the bank is enclosed.

In this respect, I respectfully ask whether or not the board of trustees has in its powers the right to enter into an agreement such as this."

The trustees of the Bradford Durfee Textile School are appointed under the provisions of G. L. (Ter. Ed.), c. 15, § 21. Their duties are outlined in G. L. (Ter. Ed.), c. 74, §§ 42–46A. By section 43 the Board of Trustees of the Bradford Durfee Textile School is created "a corporation for the purpose of taking by gift, bequest or devise any real or personal property."

With relation to trust funds, whether held by members or by a corporation composed of individuals, every member is —

"charged with the obligations of a trustee and must exercise as to every investment his best judgment and wise discretion. To make investments is fundamental, not merely administrative, in the administration of a trust. To be a manager of the fund involves the performance of personal duty, which as to investments to be made cannot be delegated to a committee or an agent. In general the duties of a trustee cannot be delegated. They are personal. Determination to make an investment does not necessarily require the affirmative vote of all members of the corporation but it requires action by a majority with opportunity and obligation, so far as reasonably practicable, for all to express their judgments."

The above-quoted language, used by the Supreme Judicial Court in *Boston* v. *Curley*, 276 Mass. 562, indicates the nature of the duties of trustees who have been made a body politic. The general principles of our law require that such duties shall be discharged by trustees in any instance. While mere ministerial duties may at times be delegated, the outstanding duties of trustees, which require the exercise of judgment and discretion, including the investment of the trust funds and their safekeeping and administration in accordance with the provisions creat-

ing the trusts, cannot be so delegated. The agreement between the board of trustees of said school and the bank indicates such a delegation on the part of the trustees of the said school as is inconsistent with the performance of their duties as trustees.

I am not advised as to the precise nature of the deeds of trust which established the various separate trust funds which are referred to in the said agreement, but they are referred to in said agreement as "funds . . . donated . . . in trust for the use of the school and/or for the benefit of the students of the school."

The general principles which I have outlined can scarcely fail to be applicable to such trust funds in regard to the impropriety and invalidity of a delegation of essential powers of management and control of such funds by the trustees; and the agreement which you have sent me in relation to trust funds mentioned therein includes, among certain innocuous provisions, other provisions for the delegation of powers which should be administered by the trustees directly, and an abandonment of the immediate control of the investments of the trust funds, which at all times ought to be the direct business of the trustees, and any corporate body of which they may be a part, and are not proper subjects for delegation to a trust company in the manner provided in the said agreement.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Constitutional Law — Use of Public Money — Charitable Institutions.

Mass. Const. Amend. XLVI prohibits the use of public money so that city water may not be furnished free of charge to certain described institutions.

OCT. 13, 1933.

Fall River Board of Finance.

GENTLEMEN: — You have asked my opinion as to the constitutionality of section 4 of an ordinance of the city of Fall River, enacted November 5, 1929, as amended September 27, 1932, and of a proposed amendment to said section 4 introduced into the city council September 26, 1933.

I assume the fact to be that the charitable institutions mentioned in said section 4, as amended, are not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the Commonwealth or Federal authority, or both, and that the schools described in the proposed amendment are schools wherein some denominational doctrine is inculcated, as well as (which appears from the words of the proposed amendment itself) not likewise so publicly owned and controlled.

Said section 4, as amended, and the proposed amendment thereto require that the said institutions and schools "shall receive their supply of city water free of charge."

Such provisions are beneficent in character, but the Mass. Const. Amend. XLVI, § 2, provides, in part: —

". . . no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning whether under public control or otherwise, wherein any denominational doctrine is inculcated, or

any other school, or any college, infirmary, hospital, institution, or educational, charitable or religious undertaking which is not publicly owned and under the exclusive control, order and superintendence of public officers or public agents authorized by the commonwealth or federal authority or both, . . ."

These provisions, therefore, by express words forbid the use of public money for the purpose of aiding any school wherein any denominational doctrine is inculcated or of aiding any charitable institution which is not publicly owned and under the exclusive control of public officers, either of Massachusetts or of the United States, or of both.

I am obliged to advise you that if the charitable institutions recited in section 4 of the ordinance, as amended, are not publicly owned and are not under the exclusive control of such public officers, and that as the parochial schools are described, in the amendment, to be schools maintained at private, not public, expense, Mass. Const. Amend. XLVI forbids the use of any public money for aiding them; and consequently, that section 4 of the ordinance and the amendment contravene the Constitution of Massachusetts.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Constitutional Law — Boston Elevated Railway — Legislative Authority.

OCT. 28, 1933.

Special Committee on Investigation of Certain Questions relating to the Boston Elevated Railway Company.

GENTLEMEN: — You request my opinion upon the following questions: —

"1. In the event of the acquisition of the properties of the Boston Elevated Railway Company by the Commonwealth or by the Boston Metropolitan District, either by eminent domain or under the option granted by St. 1931, c. 333, § 17, may the Legislature provide for the management and operation of such properties so as to ensure, for a certain period of time, immunity from legislative changes?

2. If your answer to Question 1 is in the affirmative, in what manner may the Legislature so provide for the management and operation of such properties?

3. In the event that said district acquires such properties as aforesaid under authority of legislation in which it is declared that the district shall have, hold and enjoy the same in its private or proprietary capacity for its own property and in which the terms and conditions of such management and operation are defined, — would legislation thereafter enacted relative to such properties or their management or operation be effective without the consent of the district?

4. If your answer to Question 3 is in the affirmative, to what extent may such properties or their management or operation be affected by such legislation, without the consent of the district?

5. In the event that legislation is enacted establishing a board to have the management and operation of properties to be so acquired by said district and defining the terms and conditions of such management and operation, authorizing the issue of bonds and notes by the district to provide funds for such acquisition and providing that such legislation shall be incorporated by reference in the terms and conditions of such

bonds and notes and shall constitute an essential part of the contract or agreement of the district with the holders thereof and providing further that until all of said bonds and notes, together with interest thereon, shall have been paid in full, or a sum sufficient for such payment shall have been set aside and deposited in trust therefor, the composition of the board or the method of appointment or terms of its members shall not be changed by abolition of the board or otherwise, — would the Legislature be barred from making any such change until after such payment or provision for payment?

6. In the event that legislation is enacted establishing a board to have the management and operation of properties to be so acquired by said district and defining the terms and conditions of such management and operation, authorizing the issue of bonds and notes by the district to provide funds for such acquisition and providing that such legislation shall be incorporated by reference in the terms and conditions of such bonds and notes and shall constitute an essential part of the contract or agreement of the district with the holders thereof and providing further that until all of said bonds and notes, together with interest thereon, shall have been paid in full, or a sum sufficient for such payment shall have been set aside and deposited in trust therefor, the powers and duties of the board shall not be diminished or abrogated except upon its petition or with its approval, — would the Legislature be barred from diminishing or abrogating any such power or duty except as aforesaid until after such payment or provision for payment?

7. What would your answer be to Question 5 and Question 6 if there were incorporated in the legislation referred to therein a provision that the district shall have, hold and enjoy the properties to be acquired, in its private or proprietary capacity for its own property?"

Leaving aside any element of impairment of contracts, such as you have inserted in your fifth and sixth questions, and which I assume you intended to eliminate from the preceding questions, I answer your first question in the negative. In the event of the railway property becoming public property, its management is a matter for the Legislature from time to time to determine in the light of the then existing conditions.

I answer your third question in the affirmative. In my opinion, the insertion of a provision that the district shall hold the property in its private or proprietary capacity would not affect the power of the Legislature to alter the provisions as to its management and control. The property would still be held for public use. See *Higginson* v. *Treasurer*, 212 Mass. 583, 585; *Boston* v. *Treasurer*, 237 Mass. 403, 418. In any event a legislative change in the provisions as to the management and control of the property would not, in my opinion, deprive the district of its property in such sense as to put the matter beyond legislative control. See *Broadhurst* v. *Fall River*, 278 Mass. 167, 171.

As to your fourth question, it is impossible for me to attempt to define the limits, if any, which might conceivably exist as to the power of the Legislature in the premises. Generally speaking, the power of the Legislature to alter the provisions as to management and control would, in my opinion, be very broad.

I answer your fifth question in the affirmative. It is within the power of the Legislature in connection with the public acquisition of the property to contract, or to authorize the district as a governmental instrumentality to contract, with those who loan funds for the acquisition of

the property as to its management and control pending the payment of the loans; and such contracts having been made, the Legislature cannot impair them. See *Opinion of the Justices,* 190 Mass. 605; *ibid,* 261 Mass. 523, 552.

I answer your sixth question in the affirmative upon the ground above stated.

My answer to your fifth and sixth questions would not be changed by the insertion of the provision referred to in your seventh question.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Cities and Towns — Public Works Projects — Water Supply.

St. 1933, c. 366, does not of itself give authority to a political subdivision to exercise an authority specifically reserved to the Legislature.

Nov. 1, 1933.

JOSEPH W. BARTLETT, Esq., *Chairman, Emergency Finance Board.*

DEAR SIR: — Your recent communication requests my opinion upon the following question: —

"The town of Sudbury desires to install a water installation system. There is no special Sudbury act authorizing the installation of such a system. Were we inclined to approve such a project, has Sudbury the right under existing law to install such a system?"

I have also received a communication from Theodore N. Waddell, Secretary of the Emergency Finance Board, in which he states: —

"Supplementing the letter of September 20th from Mr. Bartlett, Chairman of the Emergency Finance Board, in regard to the right of the town of Sudbury to install a water supply system, I would state that the town early in July appointed a committee to conduct an investigation relative to installing a water system. From the information we have, it does not appear that there is any special act authorizing the town to install such a system or an act establishing a water district.

The real inquiry of the Emergency Finance Board is whether or not chapter 366 of the Acts of 1933 gives us the power to grant enabling authority to the town for a water supply, or for the establishing of a water district, or to approve loans under chapter 366 of the Acts of 1933."

The primary and only purpose of St. 1933, c. 366, as expressed in the emergency preamble thereto, is "to alleviate promptly conditions of widespread unemployment," and that statute enables "cities and towns and fire, water, light and improvement districts to secure the benefits provided by the National Industrial Recovery Act" passed by the Congress of the United States as a step toward the economic rehabilitation and stability of the nation.

By section 2 of said St. 1933, c. 366, authority is conferred upon cities, towns and other political subdivisions specifically referred to in the title to "engage in any public works project included in any 'comprehensive program of public works' prepared under section two hundred and two of Title II of the National Industrial Recovery Act, but only in case such project is approved" by the Emergency Finance Board, as established by section 1, and the Governor; "and in case the proper federal authorities

have obligated the federal government to make a grant therefor of federal money under section two hundred and three of said title."

In my opinion, so much of said section 2 as enables cities and towns "to engage in any public works project included in any 'comprehensive program of public works'" does not confer new or additional powers upon municipalities. That language must be construed in the light of the inherent and the general or special powers heretofore granted to municipalities or other political subdivisions to engage in public works or undertakings. Municipalities may not engage in any public works project unless such power is in force and effect at the time approval of the project is sought, notwithstanding anything included in said "comprehensive program of public works" beyond such power.

The powers and duties of the Emergency Finance Board are specifically defined: —

1. To approve a project, provided it shall determine, amongst other things —

(*a*) The necessity of the project.

(*b*) The ability to finance such project.

(*c*) The extent to which unemployment shall be relieved by carrying on the project.

(*d*) The extent to which maintenance of the project, when completed, will increase or decrease annual expenditures and increase or decrease the tax burden.

2. If approval is given to —

(*a*) Establish "terms, conditions, rules and regulations, not inconsistent with applicable federal laws and regulations, with the approval of the governor, to ensure the proper execution of such projects."

(*b*) "Fix the terms of and rates of interest on the bonds, notes and other forms of written acknowledgment of debt issued hereunder in accordance with the applicable federal laws and regulations and subject to the approval of the proper federal authorities . . ."

The main function of the Board is to give approval to projects, without which approval such projects may not be undertaken. The word "approval" has been judicially defined in *Simpson* v. *Marlborough*, 236 Mass. 210, 214, as follows: —

"Approval implies favorable conviction manifested by affirmation concerning a specific matter submitted for decision. It does not import initiative. Approval ordinarily indicates the will to assent to an act done by someone else rather than the doing of that act. See, however, *Clarke* v. *Fall River*, 219 Mass. 580. It signifies the application of sound judgment to a proposition emanating from another source and submitted for investigation. It requires the exercise of faculties of criticism and discrimination. It denotes positive sanction. It does not mean original and inventive construction in the first instance. On the other hand, it is not a mere perfunctory act. It imposes no mean responsibility. It carries power and duty of an effective nature. It is the word used in both the State and Federal Constitutions, in the charters of many cities and in R. L. c. 26, § 9, to describe the assent required by the chief executive before acts of the legislative department become operative. *Galligan* v. *Leonard*, 204 Mass. 202. *McLean* v. *Holyoke*, 216 Mass. 62."

Your Board is not invested with any powers other than those specifically enumerated in the act (St. 1933, c. 366). Surely there is nothing

in that act which confers upon your Board, directly or by implication, such extraordinary power as to "grant enabling authority to the town for a water supply, or for the establishing of a water district." It would require pretty plain language to hold that the Legislature intended to empower your Board to grant authority to a political subdivision of the Commonwealth to exercise powers the granting of which it has, from the very inception of State government, reserved to itself, and to constitute and establish political subdivisions such as water districts.

If we assume that no special legislation has ever been passed enabling the town of Sudbury to establish a water supply — and you state that from information which you have there is none — the town can establish a water supply system in the manner authorized by G. L. (Ter. Ed.), c. 40, § 38, which provides as follows: —

"A town, by the action of its selectmen, ratified by a majority of its voters present and voting thereon at a town meeting at which the voting list shall be used, or a city, by two thirds vote of its city council, ratified by a majority of the voters thereof at an election called therefor, may, for the purpose of supplying water to its inhabitants, purchase of any municipal or other corporation the right to take water from its sources of supply or from its pipes; or may purchase its whole water rights, estates, franchises and privileges, and thereby become entitled to all its rights and privileges and subject to all its duties and liabilities; or may contract therewith for a supply of water. All purchase money received under this section by a town owing a water debt shall be applied to the payment thereof."

In that case, the town of Sudbury may incur indebtedness outside the debt limit, as provided in G. L. (Ter. Ed.), c. 44, § 8, cl. (3), which is as follows: —

"Cities and towns may incur debt, outside the limit of indebtedness prescribed in section ten, for the following purposes and payable within the periods hereinafter specified:

. . . . . .

(3) For establishing or purchasing a system for supplying the inhabitants of a city or town with water, for the purchase of land for the protection of a water system, or for acquiring water rights, thirty years."

The statutes above quoted were originally enacted by St. 1870, c. 93. In discussing said St. 1870, c. 93 (Pub. St. c. 27, §§ 27 and 28), the Supreme Judicial Court, in its decision in *Smith* v. *Dedham*, 144 Mass. 177, 178, said: —

"These sections relate to supplying the inhabitants of a town with water, which does not come within the corporate powers of towns, and must be done by authority of statute. Under it, towns can supply water to their inhabitants for all purposes, mechanical, fire, and domestic, in the manner pointed out by the statute. To supply water to the inhabitants of a town means water for all uses for which it may legally be supplied, and not necessarily for the purpose of extinguishing fires. This statute makes provisions for purchasing rights to supply pure water to the inhabitants, for which the town may issue bonds in payment . . ."

But if the town of Sudbury proposes to obtain its water supply in any manner other than that stated above, such as, for instance, "to take

water for a water supply," it is my opinion that it may not do so without specific legislative authority, and it must comply with the provisions of G. L. (Ter. Ed.), c. 3, § 5, to obtain such authority.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Municipal Employees — Leaves of Absence — Separation from the Service.

Nov. 9, 1933.

Hon. JAMES M. HURLEY, *Commissioner of Civil Service.*

DEAR SIR: — You request my opinion upon the following questions: —

"As to whether employees who are granted temporary leaves of absence with or without pay, for periods of one month or more, for reasons other than sickness, are to be regarded as separated from the service, and whether their reinstatement shall be subject to the provisions of G. L., c. 31, § 460, requiring my approval after hearing and also the approval of the city council of a city by vote.

Also, as to whether the reinstatement of an employee who is absent as the result of an injury causing him pain and sickness and occurring while in the performance of his duty, and compensated on the injury roll under the Workmen's Compensation Act, during his absence, comes under the provisions of section 46C or 46D of the chapter (G. L., c. 31, as amended by St. 1933, c. 320)."

It is impossible for me to answer your first question without all the facts being presented. The Supreme Court has said that the question of what period of absence shall constitute separation from the service "is left to be ascertained from all the material circumstances in each case as controversy may arise." *Dunn* v. *Commissioner of Civil Service*, 279 Mass. 504, 509.

As to your second question, it is my opinion that, assuming a separation from the service has occurred, such separation is "by reason of inability to work on account of sickness," within the meaning of section 46D of the statute, and that reinstatement may be made under that section.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Constitutional Law — Representative — Incompatible Office.

The office of deputy collector of internal revenue of the United States is incompatible with that of member of the House of Representatives of this Commonwealth.

Nov. 14, 1933.

Hon. LEVERETT SALTONSTALL, *Speaker of the House of Representatives.*

DEAR SIR: — I have received from you the following communication: —

"The House Committee on Rules requests your opinion as to whether or not a member of the House of Representatives of this Commonwealth, elected for the political years 1933–1934, who was recently appointed a deputy collector of internal revenue of the United States, has a right to retain his seat as representative.

In connection with the foregoing question the said committee desires to call to your attention VI Op. Atty. Gen. 358, and also Reports of Controverted Elections, 1780–1852 (Ed. 1853), pages 235 and 251.

Please see article VIII of the Amendments to the Constitution."

The pertinent portion of Mass. Const. Amend. VIII provides as follows: —

"No judge of any court of this commonwealth, (except the court of sessions,) and no person holding any office under the authority of the United States, (postmasters excepted,) shall, at the same time, hold the office of governor, lieutenant-governor, or councillor, or have a seat in the senate or house of representatives of this commonwealth; . . ."

The relation of the office of deputy collector of internal revenue of the United States with the office of representative to the General Court was considered and passed upon by one of my predecessors in office in an opinion which you mention in your letter. VI Op. Atty. Gen. 358. I am entirely in accord with said opinion and it seems to govern the instant matter, so that it appears as a matter of law that the said deputy collector is a person holding an office under the authority of the United States, within the meaning of Mass. Const. Amend. VIII, and therefore holds an office incompatible with that of member of the House of Representatives.

As was said by my predecessor in office: —

"It seems that the acceptance of this Federal office does not in and of itself vacate the office of representative. The amendment provides that 'the acceptance of such trust, by any of the officers aforesaid, shall be deemed and taken to be a resignation of his said office.'"

In the present case the House may properly accept the "resignation" or declare the seat vacated, provided the representative who has been appointed a deputy collector has qualified as such.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Constitutional Law — Representative — Incompatible Office.

The receiver of a national bank holds an office incompatible with that of member of the House of Representatives of this Commonwealth.

Nov. 14, 1933.

Hon. LEVERETT SALTONSTALL, *Speaker of the House of Representatives.*

DEAR SIR: — I am in receipt from you of the following communication: —

"The House Committee on Rules requests your opinion as to whether or not a member of the House of Representatives of this Commonwealth, elected for the political years 1933–1934, who was recently appointed receiver of a national bank, has a right to retain his seat as representative. See article VIII of the Amendments to the Constitution."

I am of the opinion that a member of the House of Representatives of this Commonwealth who was appointed receiver of a national bank, if he still retains such post, has no right as a matter of law to retain his seat in such body.

Mass. Const. Amend. VIII, in its applicable part, provides: —

"No judge of any court of this commonwealth, (except the court of sessions,) and no person holding any office under the authority of the

United States, (postmasters excepted,) shall, at the same time, hold the office of governor, lieutenant-governor, or councillor, or have a seat in the senate or house of representatives of this commonwealth; . . ."

Although the position of receiver under appointment of a State court has in some instances been said not to be an "office," since such position in the particular instances was the mere agency of a court alone and not of the sovereign power, yet it is the established law that the receiver of a national bank, who is appointed, not by a court but by the Comptroller of the Currency under the Federal statutes of the United States, holds an office under the authority of the United States. *In re Chetwood*, 165 U. S. 443, and cases there collected; *Auten* v. *United States National Bank*, 174 U. S. 125, 141; *Gibson* v. *Peters*, 150 U. S. 342; *Baird* v. *Lefor*, 52 N. D. 155, and cases there collected; *Price* v. *Abbott*, 17 Fed. 506.

It was the intention of the framers of Mass. Const. Amend. VIII to cover a deficiency which existed by reason of the lack of a definite statement as to what constituted incompatibility of offices, and the following language used by the framers of the amendment, "No person holding any office under the authority of the United States," marks an intention to exclude all holders of offices of every character who were under the authority of the United States, irrespective of the magnitude or nature of the office, so long as it was a true office, with the single exception of those who held the office of postmaster. No other exceptions were indicated.

In view of the fact that it has been repeatedly decided that the receiver of a national bank is an officer of the United States — that is, one holding a public office — it would seem plain that such an officer falls within the terms of our Constitution in respect to the incompatibility of State legislative office with that of office holding under the authority of the United States.

The House is of course the judge of the qualifications of its own members. The acceptance and qualification as the holder of a Federal office by a representative of the General Court may be treated and acted upon by the House at its pleasure, so as to cause a vacancy in the seat of the person holding such office.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Insurance — Motor Vehicles — United States Reservations.

The owner of an automobile regularly garaged in a United States reservation should pay a premium charge asked for a "car regularly garaged outside the State" in Territory XXII.

Nov. 20, 1933.

Hon. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — You have addressed to me the following communication: —

"Certain automobiles which require insurance under the compulsory law are owned by residents of the Navy Yard and the U. S. Naval Hospital Reservation at Chelsea, and are principally garaged in these two places, respectively, which are known as Territories III and I in the classifications of risks and schedules of premium charges set up by me for the coming year. The reservations where these automobiles are principally garaged are within the exclusive jurisdiction of the United States.

On page 19 of the Massachusetts Automobile Manual it is provided that: —

'Unless otherwise provided in this Manual any car regularly garaged outside of the State and owned by a resident of the State of Massachusetts, or by a non-resident . . . shall be charged the rate for Territory 22 for statutory coverage.'

The question is before me for decision as to whether these automobiles owned and garaged as aforesaid, at the Navy Yard in Boston, and at the Naval Hospital in Chelsea, are to be charged the premium charges for Territories III and I, respectively, or whether they must as a matter of law be said to be garaged outside of Massachusetts and so should pay a premium charge corresponding to that for private passenger automobiles, of which type they are, in Territory XXII.

I respectfully request your opinion upon the question of law raised by the above query."

Inasmuch as you advise me that the motor vehicles under consideration are principally garaged at the U. S. Naval Hospital at Chelsea, and at the U. S. Navy Yard at Charlestown, respectively, places which are within the exclusive jurisdiction of the United States, they must each be considered as falling within the meaning of a "car regularly garaged outside of the State," as those words are used in the rules promulgated by you with relation to the rates and classifications of compulsory motor vehicle liability insurance and set forth above in your reference to page 19 of the Massachusetts Automobile Manual.

In an opinion given by me to His Excellency the Governor on March 14, 1933 (*ante*, p. 45), I stated that automobiles which were customarily kept on reservations under the exclusive jurisdiction of the United States were not subject to an excise tax, which by the terms of the applicable statute was to be assessed and levied "on each motor vehicle customarily kept within the Commonwealth," because such automobiles kept on such reservations could not be said to be kept "within the Commonwealth," as those words were used in the applicable statute [G. L. (Ter. Ed.), c. 60A, § 1].

The considerations which caused me to give the foregoing opinion likewise constrain me to advise you that under the said rule made by you as aforesaid each of these cars should be charged the rate set up by you in any year for "a car regularly garaged outside the State."

Very truly yours,

JOSEPH E. WARNER, *Attorney General.*

Hours of Labor — Women — Seasonal Manufacturing.

G. L., c. 149, § 56, gives the Department of Labor and Industries no authority to modify the provision for a nine-hour day.

Nov. 21, 1933.

Hon. EDWIN S. SMITH, *Commissioner of Labor and Industries.*

DEAR SIR: — You request my opinion as to whether section 56 of G. L., c. 149, "intends to give the Department of Labor and Industries authority to permit women to work more than nine hours a day in manufacturing operations which it may declare seasonal, or whether its authority and the intent of the statute merely extend to the provision in regard to the total weekly hours."

Said section 56, so far as material, reads as follows: —

"No child and no woman shall be employed in laboring in any factory or workshop, or in any manufacturing, mercantile, mechanical establishment, telegraph office or telephone exchange, or by any express or transportation company, or in any laundry, hotel, manicuring or hair dressing establishment, motion picture theatre, or as an elevator operator, or as a switchboard operator in a private exchange, more than nine hours in any one day except that hotel employees who are not employed in a manufacturing, mercantile or mechanical establishment connected with a hotel may be employed more than nine hours but not more than ten hours in any one day; and in no case shall the hours of labor exceed forty-eight in a week, except that in manufacturing establishments where the employment is determined by the department to be by seasons, the number of such hours in any week may exceed forty-eight, but not fifty-two, provided that the total number of such hours in any year shall not exceed an average of forty-eight hours a week for the whole year, excluding Sundays and holidays; . . ."

In my opinion, the statute gives the department no authority to modify the nine-hour per day provision.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Fraternal Benefit Society — By-laws — Assessments.

Nov. 22, 1933.

HON. MERTON L. BROWN, *Commissioner of Insurance.*

DEAR SIR: — You have advised me of the following facts relative to a certain foreign fraternal benefit society which you say is —

". . . doing business on the lodge system pursuant to the provisions of section 41 of chapter 176 of the General Laws. This society established a segregated class in June 1929. . . .

This society was incorporated in the State of New York and its charter with respect to the segregated class above mentioned contains the following provision:

'Assessments and contributions paid by members in this class shall be segregated and maintained in a separate fund and shall be applicable only to death benefits due to beneficiaries of deceased members of this class, except that the Constitution or By-laws of the Society may provide that the rates to be paid by the members in this class shall include, in addition to the rates based upon the American Experience Table of Mortality, with an interest assumption of not higher than 4% per annum, nine cents per month for each $500,000 insurance, to be paid into a separate fund to be known as a Fraternal Fund, which fund may be used for the purpose of paying death benefits to beneficiaries of members holding certificates under the Post Mortem Plan; and provided further that any surplus in excess of one hundred and ten percent of the legal reserves required under the laws of the State and under the Constitution and Laws of the Society may also be used in payment of such benefits to beneficiaries of members holding certificates in the Post Mortem Plan.'

This society through its proper officers proposes to amend its by-laws, so as to provide as follows: —

'The rates provided for in this section include contributions to the Mortuary Fund of the segregated class (Class B), based upon the American Experience Table of Mortality and 4% interest assumption, and in addition thereto, 9¢ per month for each $500.00 insurance, as contribution to the Endowment Reserve Fund of Class A, to be used in the payment of death claims or other liabilities occurring in the post-mortem assessment class (Class A); such contribution shall continue and shall be paid to the Fraternal Fund for the purpose here designated, so long as there shall remain any members in the group holding said form of certificates (post mortem Class A).' "

In relation to the foregoing you have asked me the following questions: —

"1. May the society operate in this Commonwealth under a by-law which permits it to assess members of the segregated class for the benefit of another class or classes?

2. May the directors of a foreign fraternal society who are authorized by its charter to amend its by-laws make an amendment thereto which will authorize such society to transact business in the Commonwealth contrary to the provisions of our law relating to domestic societies?"

G. L. (Ter. Ed.), c. 176, § 40, provides: —

"If the stated periodical contributions of the members of any society subject to section thirty-nine are insufficient to pay all reported death and disability claims in full, and to provide for the creation and maintenance of the funds required by its by-laws or by this chapter, additional contributions or additional, increased or extra rates of contribution shall be collected from its members to meet the deficiency, and the by-laws of the society shall so provide; and such by-laws may provide that upon the written application or consent of the member his certificate may be charged with its proportion of any deficiency disclosed by valuation, with interest not exceeding five per cent per annum.

In rerating its members or for the purpose of placing itself on a sounder financial basis, any domestic society and any foreign society now admitted to this commonwealth, if it be not in conflict with the laws of its domicile, may, if 'legally solvent' as defined in said section thirty-nine, establish by its constitution and by-laws a separate class of members who shall make mortuary contributions on the basis prescribed in section eight, to which class all new members who from time to time join the society shall be assigned, unless such new member or members shall otherwise elect, and all present members may at their option be transferred at the prescribed rate for such class.

The mortuary contributions of such class shall be placed in a separate account and used only for the benefit of the members of that class or of their beneficiaries. In case of a society which has established such higher rate class whose contributions are held and used as herein set forth the 'additional contributions' or 'extra rates' specified in this section shall be required only of the members of the class or classes respectively where the deficiency in contributions is apparent, and each class shall provide for its own deficiency. Any class of a domestic society failing so to do shall be subject to the receivership provisions set forth in section thirty-six. If a society can show, by an annual valuation as hereinbefore provided, that it is accumulating and maintaining for all of its members who are not included in the separate class of members hereinbefore referred to the tabular reserve required by a table of mortality not lower than the Na-

tional Fraternal Congress Table of Mortality as adopted at the National Fraternal Congress August twenty-third, eighteen hundred ninety-nine, and four per cent interest, and which has provided for stated periodical mortuary contributions based on said standard, then such society may abolish the segregation of members and funds hereinbefore required. A foreign society which has legally established such a class in its home state and whose constitution or by-laws require the segregation and use of the mortuary contributions of its members as herein set forth may be admitted to this commonwealth with respect to such class upon compliance with the laws of this commonwealth not in conflict with this provision."

Upon examination of the original charter provisions which you have set forth as applicable to a "separate class of members," as those words are used in said section 40, and of the proposed amendment to the by-laws, which you have likewise set forth, it would appear that both are in contravention of the terms of said section 40, inasmuch as each, in different ways, makes provision for "mortuary contributions," as those words are used in said section 40, by "a separate class of members," part of which must or may be used for the benefit of the members of another class, in a rerating scheme. This form of use of "mortuary contributions" in a rerating scheme is forbidden to both domestic and foreign fraternal benefit societies by said G. L., c. 176, § 40.

Accordingly, I answer both your questions, predicating my answer solely upon the facts which you have set forth in your communication and the law applicable to them, in the negative.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

Retirement System — County Employees — Allowances.

Under G. L., c. 32, §§ 20–26, the words "salary" or "wages" are not to be interpreted as including the idea of maintenance for employees.

Nov. 24, 1933.

Hon. HENRY F. LONG, *Commissioner of Corporations and Taxation.*

DEAR SIR: — You have written me a letter in which you state in effect that the County Personnel Board in working out the classification of county salaries, offices and positions under G. L., c. 35, §§ 48–56, has adopted a plan which seems to you to be at variance with the plan used by the Retirement Board in estimating retirement allowances of county employees.

The plan which is used by the County Personnel Board, as you state, treats salary or wages and maintenance given to an employee as forming together the amount of his compensation. I think that this practice by the County Personnel Board is justified for the purposes of the classification of county salaries, offices and positions and is in harmony with G. L., c. 35, § 55. Justification for this is to be found, I think, in section 49, which reads, in part: —

"Every office and position whereof the salary is wholly payable from the treasury of one or more counties, . . . shall be classified by the board in the manner provided by sections forty-eight to fifty-six, inclusive, and . . . shall be allocated by the board to its proper place in such classification. . . . The word 'salary', as used in this section, shall include compensation, however payable; . . ."

Although this definition of "salary" is applied exclusively to the wording of said section 49 and is not extended to the remaining sections of said chapter 35, nevertheless I think the description of the offices and positions specified in section 49, in the light of the interpretation of the word "salary" in connection with them, indicates an intention on the part of the Legislature, with relation to maintenance as a part of salary or wages, which furnishes a foundation for the method which you say has been employed by the County Personnel Board in setting up the classifications.

These considerations, however, do not apply to the interpretation which the Retirement Board must use in construing the provisions of the county retirement system law as set forth in G. L., c. 32, §§ 20–26. There is no special definition of "salary or wages" set forth in connection with county retirement systems, which includes maintenance as a part of salary or wages, and in the natural use of the words "salary or wages" maintenance is not embraced. The omission to so define "salary or wages" as embracing maintenance, in the sections of chapter 32 with relation to the county retirement system, is in direct contradistinction to the definition of "salary or wages" which is set up by the same chapter, specifically in section 1, with relation to the State retirement system. There "salary or wages" is defined particularly as being "cash received for regular services together with such allowance for other compensation not paid in cash as may be hereinafter provided."

The omission of any similar definition in those sections of the same chapter which deal with county retirement systems would seem to leave the Retirement Board without any authority to treat "salary or wages," under the terms of the sections of chapter 32 dealing with the retirement system for counties, in any other manner than as possessing their usual or natural meaning, which does not include the idea of maintenance. If there be any injustice worked by the discrepancy between the effect of the wording of chapters 32 and 35, it might be remedied by further legislation.

Very truly yours,
JOSEPH E. WARNER, *Attorney General.*

INDEX TO OPINIONS

RULES OF PRACTICE

In Interstate Rendition.

Every application to the Governor for a requisition upon the executive authority of any other State or Territory, for the delivery up and return of any offender who has fled from the justice of this Commonwealth, must be made by the district or prosecuting attorney for the county or district in which the offence was committed, and must be in duplicate original papers, or certified copies thereof.

The following must appear by the certificate of the district or prosecuting attorney: —

(*a*) The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled.

(*b*) That, in his opinion, the ends of public justice require that the alleged criminal be brought to this Commonwealth for trial, at the public expense.

(*c*) That he believes he has sufficient evidence to secure the conviction of the fugitive.

(*d*) That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.

(*e*) If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application, as near as may be.

(*f*) If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.

(*g*) That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever; and that, if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

(*h*) The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.

(*i*) If the offence charged is not of recent occurrence, a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretences, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principal complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason given for the absence of such affidavit.

2. Proof by affidavit of facts and circumstances satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made, must be given. The fact that the alleged criminal was in the State where the alleged crime was committed at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the facts and circumstances showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a magistrate. (A notary public is not a magistrate within the meaning of the statutes.) It must also be shown that a complaint has been made, copies of which must accompany the

requisition, such complaint to be accompanied by affidavits to the facts constituting the offence charged by persons having actual knowledge thereof, and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application. The affidavit or affidavits should contain sufficient facts to make out a prima facie case of guilt, and should not be a reiteration of the form of the complaint nor contain conclusions of law.

5. The official character of the officer taking the affidavits or depositions, and of the officer who issued the warrant, must be duly certified.

6. Upon the renewal of an application, — for example, on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, — new or certified copies of papers, in conformity with the above rules, must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailer, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody, showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.

750. 7–'34. Order 167.